No. 15-339

Title:	Michael Ross, Petitioner
	v.
	Shaidon Blake
Docketed:	September 17, 2015
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(1307279)
Decision Date:	May 21, 2015
Rehearing Denied:	June 16, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Sep 14 2015	Petition for a writ of certiorari filed. (Response due October 19, 2015)
Sep 23 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Oct 14 2015	Order extending time to file response to petition to and including November 18, 2015.
Oct 19 2015	Brief amici curiae of West Virginia, and 21 other States filed.
Nov 2 2015	Brief of respondent Shaidon Blake in opposition filed.
Nov 16 2015	Reply of petitioner Michael Ross filed. (Distributed)
Nov 17 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 11 2015	Petition GRANTED.
Jan 15 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 27, 2016.
Jan 22 2016	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including January 29, 2016.
Jan 22 2016	The time to file respondent's brief on the merits is extended to and including March 3, 2016.
Jan 29 2016	SET FOR ARGUMENT ON Tuesday, March 29, 2016
Jan 29 2016	Joint appendix filed. (Statement of costs filed)
Jan 29 2016	Brief of petitioner Michael Ross filed.
Feb 5 2016	Brief amicus curiae of United States filed.
Feb 5 2016	Brief amici curiae of West Virginia and 38 Other States filed.
Feb 8 2016	Record requested from U.S.C.A. 4th Circuit.
Feb 11 2016	Record received from U.S.C.A. 4th Circuit is electronic and located on PACER.
Feb 18 2016	Record received from U.S.D.C. Dist. of Maryland Southern Div. is electronic and located on PACER. Sealed records are also electronic, not on PACER.
Feb 23 2016	CIRCULATED.
Mar 1 2016	Proposal of counsel for respondent to lodge bound copies of non-record materials cited in respondent's brief on the merits.
Mar 3 2016	Brief of respondent Shaidon Blake filed. (Distributed)

Mar 7 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 8 2016	Brief amici curiae of Legal Aid Society of New York and Morningside Heights Legal Services, Inc. filed. (Distributed)
Mar 10 2016	Brief amicus curiae of National Police Accountability Project and Human Rights Defense Center filed. (Distributed)
Mar 17 2016	Proposal of counsel for petitioner to lodge copies of non-record materials cited in the reply brief on the merits.
Mar 18 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 21 2016	Reply of petitioner Michael Ross filed. (Distributed).
Mar 23 2016	The Clerk has approved respondents lodging proposal. Copies of non-record material received and distributed.
Mar 24 2016	The Clerk has approved petitioner's lodging proposal. Copies of cited material received and distributed.
Mar 29 2016	Argued. For petitioner: Julia Doyle Bernhardt, Assistant Attorney General, Baltimore, Md.; and Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Paul W. Hughes, Washington, D.C.
Jun 6 2016	Judgement VACATED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Alito, and Sotomayor, JJ., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed an opinion concurring in part.
Jul 8 2016	JUDGMENT ISSUED

15-339

Supreme Court, U.S.
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SEP 14 2015
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No. 15-___

In The Supreme Court of the United States

MICHAEL ROSS,
Petitioner,
v.
SHAIDON BLAKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fourth Circuit misapply this Court's precedents in holding, in conflict with several other federal courts of appeals, that there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he satisfied exhaustion by participating in an internal investigation?

PARTIES TO THE PROCEEDINGS

The petitioner is Lieutenant Michael Ross, a correctional officer employed by the Maryland Department of Public Safety and Correctional Services ("DPSCS"). The respondent is Shaidon Blake, a prisoner in DPSCS custody.

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PETITION FOR A WRIT OF CERTIORARI

Michael Ross respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 787 F.3d 693 (4th Cir. 2015) (split decision). App. 1-29. The opinion and order of the United States District Court for the District of Maryland are unreported. App. 29-63.

JURISDICTION

The basis for jurisdiction in the district court was 28 U.S.C. § 1331. The court of appeals issued its decision on May 21, 2015. On June 16, 2015, the court of appeals denied Lt. Ross's petition for rehearing en banc. App. 64. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT

Congress enacted the Prison Litigation Reform Act ("PLRA") in 1996 to slow the relentless cascade of unmeritorious, and routinely frivolous, prisoner civil rights lawsuits, which were then overwhelming the federal judicial system. A "centerpiece" of the PLRA is its mandatory requirement that a prisoner exhaust administrative remedies before filing suit in federal court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). In this case, a divided panel of the Fourth Circuit fashioned a new common law exception to the PLRA's exhaustion provision that threatens to erode this central requirement and invite a deluge of frivolous prisoner lawsuits. Specifically, the Fourth Circuit, in a 2-1 opinion authored by Judge Gregory, held that there are some "special circumstances" under which the exhaustion requirement may be excused, including when an inmate "reasonably" but mistakenly "believed" that he had exhausted his remedies. *Blake v. Ross*, 787 F.3d 693, 698 (4th Cir. 2015). App. 2, 9.

1. The number of lawsuits filed by prisoners in federal district court challenging prison conditions and purported civil rights violations skyrocketed between fiscal years 1980 and 1995. These suits almost doubled from 13,629 in 1980 to 26,136 in 1990 and then increased by another 60 percent over the next five years, reaching 41,679 in 1995. These prisoner suits constituted nearly 17 percent of the total civil cases filed in federal district courts that year. *See* United States Courts, *Statistics & Reports*, Table C-2—U.S. District Courts–Judicial Business

Tables (Sept. 30, 1980–Sept. 30, 2014).[1] A "high percentage" of these suits were "meritless, and many [were] transparently frivolous." *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988). As one federal judge aptly put it, a prisoner who "actually suffers a meaningful deprivation must hope that in that sea of frivolous prisoner complaints, his lone, legitimate cry for relief will be heard by a clerk, magistrate or judge grown weary of battling the waves of frivolity." *Cotner v. Campbell*, 618 F. Supp. 1091, 1096 (E.D. Okla. 1985) *aff'd in part, vacated in part sub nom. Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986).

The new, mandatory requirement that inmates exhaust all available remedies, 42 U.S.C. § 1997e(a), was intended to "invigorate[]" a preexisting provision that had merely given district court judges the discretion to dismiss a federal suit for failure to exhaust. *Woodford*, 548 U.S. at 84. Congress envisioned that requiring exhaustion in every case would "reduce the quantity and improve the quality of prisoner suits" by (1) providing "prisons with a fair opportunity to correct their own errors," (2) "persuad[ing]" some prisoners "not to file an action," and (3) creating an administrative record that would assist courts in evaluating the merits of

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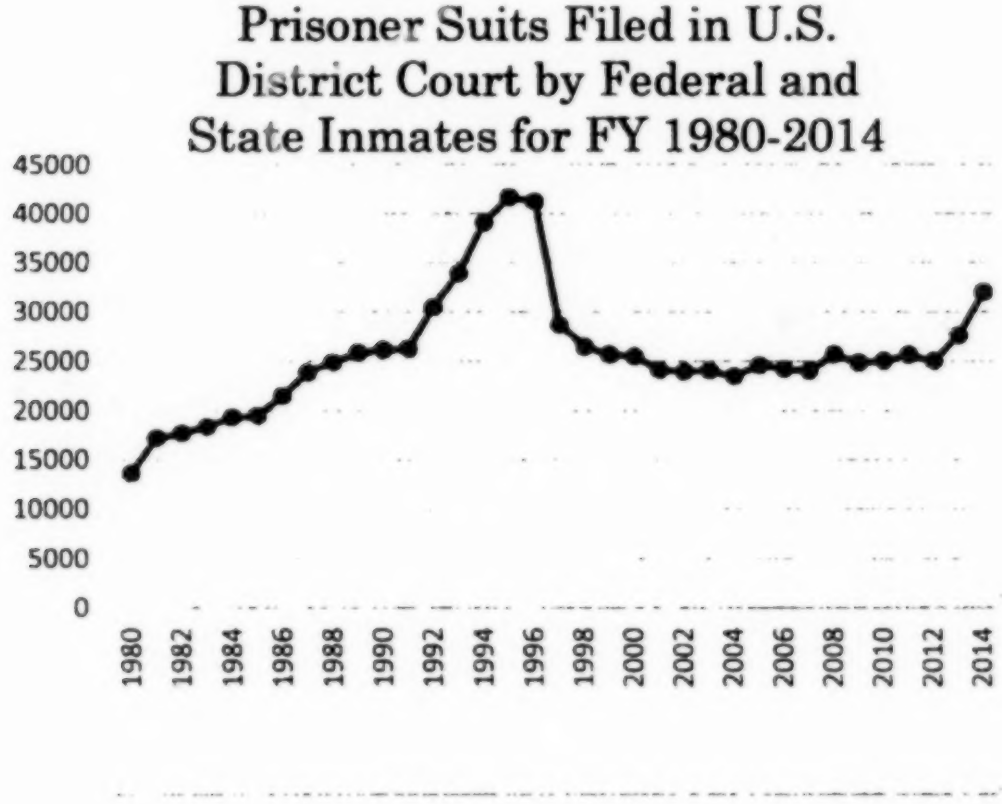
[1] These tables are available from the Administrative Office of the United States Courts ("AOC"). Tables from 2000-2014 are also on the AOC's website. After 1998, prisoner lawsuits were divided into two categories: prison conditions cases and prison civil rights cases. The total number of prisoner suits can be calculated by adding together those two categories.

the cases. *Id.* at 94 (internal quotation marks omitted).

As the following graph illustrates, the PLRA had an immediate remedial effect when it was enacted in 1996, with the number of suits returning to and remaining at more manageable levels.



2. Mr. Blake is an inmate in the custody of the Maryland Department of Public Safety and Correctional Services ("DPSCS"). Mr. Blake alleges that a correctional officer, James Madigan, punched him while Lt. Ross was escorting Mr. Blake from his cell.[2] App. 3-4. No one disputes that Mr. Blake

[2] Mr. Blake reached a settlement with Officer Madigan, who is no longer a party to these proceedings.

failed to exhaust his available administrative remedies before filing suit in federal court.

a. Maryland has a comprehensive, easy-to-understand administrative system to address inmate grievances. Inmates may submit a request for an administrative remedy to the warden of the institution. App. 8. If the request is denied, the inmate may appeal to the State's Commissioner of Correction, who oversees Maryland's prison system. *Id.* Finally, the inmate may appeal the Commissioner's decision to the Inmate Grievance Office ("IGO"), an independent entity within the DPSCS. *Id.*

This administrative remedy procedure is governed by prison directives issued by the Division of Correction (the "Division"), the unit within DPSCS that manages the State's prisons. The Division also provides a handbook to every inmate that summarizes the process in layman's terms and informs inmates that the full directives are available in the library. App. 77-81. The handbook explains that inmates may submit a request for administrative remedy to the warden for "*all* types of complaints," including use of force claims like the one Mr. Blake raises here, with a few limited exceptions. App. 77-78 (emphasis added).

At the time of the events in this case, the only exceptions were for complaints about parole decisions, inmate discipline, withholding of mail, and inmate classification. App. 77 Neither the handbook nor the directives included, or even suggested, any exception for complaints that also happened to be the subject of a separate internal

affairs investigation. In addition, every Maryland prison offers an administrative remedy coordinator to answer questions about the process. App. 78.

Moreover, the Division conducts a mandatory orientation for each new inmate that, among other things, addresses the prison's administrative remedy procedure. App. 74-75.) Mr. Blake attended this orientation session and signed a form acknowledging that he received the handbook and "oral communication" on "the system for processing complaints regarding institutional matters." App. 74.

Despite having access to all of this information, Mr. Blake never started—much less completed—the prison's simple grievance process.

b. After the alleged incident in this case, the Division on its own began an internal investigation focusing on Officer Madigan's conduct. App. 66-67 An internal affairs investigator asked Mr. Blake some questions, and Mr. Blake also provided a written statement. App. 66-68.

The sole purpose of an internal investigation is to determine whether a correctional officer's conduct requires disciplinary action, not to provide any remedy to the inmate. *See* Code Md. Regs. ("COMAR") §§ 12.11.01.04; 12.11.01.03A(1). In fact, the Internal Investigative Unit lacks authority to remedy a prisoner's complaint, COMAR § 12.11.01.04, and Mr. Blake was explicitly informed that he was not even entitled to learn the outcome of the investigation. App. 69-70. In contrast, if Mr. Blake had followed the prison's normal grievance

procedure, he would have had the opportunity to request other relief, including monetary compensation. *See* COMAR 12.07.01.10D.

Mr. Blake admits that he was aware of the prison's internal grievance procedures, but he nonetheless failed to file any request for an administrative remedy. App. 70-71. He testified further that he did not read any of the relevant directives, but merely assumed that he did not need to file such a request. App. 71. He claimed to believe that the issue was already "dealt with internally" through the internal investigation. App. 70-71.

3. In 2009, Mr. Blake filed this action in the United States District Court for the District of Maryland. Lt. Ross moved for summary judgment on the ground that Mr. Blake had failed to exhaust his available administrative remedies. The district court rejected Mr. Blake's argument that cooperating with an internal investigation satisfied his obligation to exhaust his administrative remedies and granted summary judgment to Lt. Ross. App. 38-39, 60-61.

a. A divided panel of the Fourth Circuit reversed, recognizing for the first time a common law exception to the PLRA's exhaustion requirement. The majority opinion, written by Judge Gregory, held that even though administrative remedies were available and Mr. Blake had failed to exhaust those remedies, "special circumstances" nonetheless excused his failure. *Blake*, 787 F.3d at 698 (quoting *Giano v. Goord*, 380 F.3d 670, 676 (2d Cir. 2004)). In particular, the court of appeals determined that Mr. Blake's failure to exhaust his available remedies was justified because he "reasonably believed that he had

sufficiently exhausted his remedies by complying with an internal investigation." *Id.* at 699-700.

In the court's view, the prison's internal investigation process for correctional officers served the same substantive purposes as an administrative grievance procedure for inmates. *Id.* at 698-99. The court also found that the prison's grievance process was confusing because the handbook and directives did not explicitly address the specific scenario at issue, *i.e.*, whether a request for administrative remedy and an internal investigation could proceed at the same time. *Id.* at 699-700. Then, because exhaustion is an affirmative defense, the court put the burden on the State to disprove that Blake's purported interpretation of the process was reasonable. *Id.* at 700.

Judge Agee dissented. He criticized the majority's new reasonable belief exception because this Court has consistently rejected "attempts to engraft exceptions that derive from 'traditional doctrines of administration exhaustion' onto the PLRA's statutory exhaustion requirement." *Blake*, 787 F.3d at 704 (Agee, J., dissenting) (citing *Woodford*, 548 U.S. at 85, 91 n.2; *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)). As Judge Agee explained, this Court's prior decision in *Woodford* "seems inconsistent with ad hoc exceptions like one premised on a prisoner's 'reasonable mistake.'" *Id.* at 703. In *Woodford*, this Court held that prisoners must complete all the steps in the administrative process properly before filing suit, but, as Judge Agee pointed out, the majority's exception dispensed with this requirement. *See id.*

The dissenting judge also explained that participating in an internal investigation could not satisfy the PLRA's exhaustion requirement because "prisoner grievance proceedings and internal investigations serve different and not entirely consistent purposes." *Blake*, 787 F.3d at 702-03. An internal investigation, after all, "may lead to disciplinary proceedings targeting the wayward employee but ordinarily does not offer a remedy to the prisoner who was on the receiving end of the employee's malfeasance." *Pavey v. Conley*, 663 F.3d 899, 905 (7th Cir. 2011).

The dissenting judge also observed that Maryland's process was not confusing because the directives expressly provided that inmates had to use the prison's internal grievance procedure for *all* complaints with only four limited exceptions, none of which applied to Mr. Blake's case. *Id.* at 701-02. And, in any event, he queried, "[h]ow could Blake have reasonably interpreted procedures that were available to him but that he never bothered to read?" *Id.* at 703.

b. The court of appeals subsequently denied Lt. Ross's timely petition for rehearing en banc. App. 64.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's conclusion that the PLRA's exhaustion requirement is "not absolute," *Blake*, 787 F.3d at 698, and its decision to import a common law reasonable belief exception into the PLRA, conflict with the decisions of several other courts of appeals. The Fifth and Eighth Circuits have refused to import

any common law exceptions into the PLRA, and the Eighth Circuit has specifically rejected an exception identical to the Fourth Circuit's for inmates who "logical[ly]" believed that they had exhausted their administrative remedies. *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000), *cert denied* 531 U.S. 1156 (2001); *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam). Also, in contrast to the Fourth Circuit, three courts of appeals have held that participating in internal affairs investigations cannot serve the same substantive purposes as filing a grievance through the prison's normal administrative process, and therefore cannot satisfy Congress's exhaustion requirement. *See Pavey*, 663 F.3d at 905-06 (7th Cir. 2011); *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953-54 (9th Cir. 2005); *Thomas v. Woolum*, 337 F.3d 720, 734 (6th Cir. 2003), *abrogated on other grounds by Woodford*, 548 U.S. at 87 This Court's intervention is now necessary to resolve the multiple conflicts among the circuits.

What is more, the Fourth Circuit's decision also conflicts with this Court's precedents. This Court has consistently held that the PLRA's exhaustion requirement is "mandatory," and it has consistently refused to engraft common law exceptions borrowed from "traditional doctrines" of administrative law onto this mandatory requirement. *Woodford*, 548 U.S. at 85, 91 n.2; *Booth*, 532 U.S. at 741 n.6. Even the Second Circuit, which had previously recognized a reasonable belief exception upon which the Fourth Circuit relied in *Blake*, has "questioned the continued viability of" that exception "following the Supreme

Court's decision in *Woodford*." *Amador v. Andrews*, 655 F.3d 89, 102-03 (2d Cir. 2011).

The reasonable belief exception functionally eviscerates the mandatory exhaustion requirement that this Court has characterized as a "centerpiece" of the Act, *Woodford*, 548 U.S. at 84, and, consequently, reopens the floodgates to a multitude of frivolous prisoner claims. Given the massive number of prisoner cases that the federal courts consider on a daily basis, this common law exception to the PLRA's mandate is a matter of exceptional importance that this Court should consider.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS.

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The plain language of the statute does not contemplate any exceptions: so long as remedies are available, a prisoner must exhaust them.

The Fourth Circuit and the Second Circuit, despite this plain language, have held that an inmate should be excused from exhausting his or her remedies—even when those remedies were actually available—if the inmate had a reasonable belief that he complied with the process. *Blake*, 787 F.3d at 698; *Giano*, 380 F.3d at 679. In direct conflict with these holdings, the Eighth Circuit has specifically rejected

a proposed exception that would have applied to inmates who "logically" "believed" they had exhausted their remedies. *See Chelette*, 229 F.3d at 688.

In *Chelette*, the plaintiff did not file a grievance through the prison's administrative procedure because the warden had "stated he would take care of the matter." *Id.* at 686. The district court held that, even though the plaintiff should have filed a grievance, "it was logical for [him] to believe that he had pursued such administrative remedies as were available to him." *Id.* The Eighth Circuit reversed, concluding that the PLRA "says nothing about a prisoner's subjective beliefs, logical or otherwise," and emphasizing that "'we are not free to engraft upon the statute an exception that Congress did not place there.'" *Id.* at 688 (quoting *Castano v. Nebraska Dep't of Corr.*, 201 F.3d 1023, 1025 (8th Cir. 2000)).

There is also substantial disagreement among the circuits on whether the PLRA admits to *any* exceptions to the mandatory exhaustion requirement where the administrative remedies in question are available. The Fourth Circuit found that the exhaustion requirement "is not absolute" and that it could therefore borrow an exception from administrative law *Blake*, 787 F.3d at 698. But, in conflict with this holding, the Eighth and Fifth Circuits have held that they will not read *any* common law exceptions based on traditional principles of administrative law into the PLRA.

In *Chelette*, the Eighth Circuit held that it was "not free to engraft upon the statute an exception that Congress did not place there." *Chelette*, 229 F.3d at 688 (quoting *Castano*, 201 F.3d at 1025). Similarly, the Fifth Circuit held that this Court's decision in *Woodford* "tacitly overruled" an earlier panel opinion providing that the "exhaustion requirement may, in certain rare instances, be excused." *Gonzalez*, 702 F.3d at 787-88. The Fifth Circuit explained that "[a]fter *Woodford* there can be no doubt that pre-filing exhaustion of prison grievance procedures is mandatory" and that "[d]istrict courts have no discretion to excuse a prisoner's failure to properly exhaust the grievance process before filing their complaint." *Id.* at 788.

Finally, the Fourth Circuit's holding also conflicts with decisions of the Sixth, Seventh, and Ninth Circuits. The Fourth Circuit held that Mr. Blake should be excused from exhausting his remedies in part because the internal investigation served the same substantive purpose as the prison's grievance procedures. *See Blake*, 787 F.3d at 698-99. These other courts of appeals, however, have reasoned that internal affairs investigations do not serve the same purposes as grievance procedures and therefore that participating in an internal investigation does not excuse a prisoner from exhausting administrative remedies. *See Pavey*, 663 F.3d at 905-06; *Panaro*, 432 F.3d at 953-54; *Thomas*, 337 F.3d at 734.

The Seventh Circuit, for instance, explained that an internal investigation "may lead to disciplinary proceedings targeting the wayward employee but ordinarily does not offer a remedy to the prisoner

who was on the receiving end of the employee's malfeasance." *Pavey*, 663 F.3d at 905. Similarly, the Ninth Circuit observed that "[a]lthough the internal affairs investigation could, and did, result in adverse action against [the correctional officer]," the "only potential remedies available to [the prisoner] were through the administrative grievance procedure." *Panaro*, 432 F.3d at 953. And the Sixth Circuit emphasized that the PLRA focuses on a prisoner's administrative remedies, not "other information compiled in other investigations." *Thomas*, 337 F.3d at 734.

Although these three courts did not consider the applicability of a reasonable belief exception, their rationale nonetheless conflicts with the Fourth Circuit's conclusion that participating in an internal investigation serves the same substantive goals as administrative exhaustion—a conclusion that was essential to its holding. *See Blake*, 787 F.3d at 698-99. Moreover, even the Second Circuit, which has a reasonable belief exception, has held that an inmate's informal complaint to correctional officers during a routine investigation of an altercation between two prisoners did not excuse the inmate from exhausting the normal administrative process. *See Ruggiero v. County of Orange*, 467 F.3d 170, 176-78 (2d Cir. 2006). This Court should therefore resolve the widespread disagreement and confusion among the circuits about whether the PLRA admits of any common law exceptions, and specifically a reasonable belief exception.

II. THE DECISION BELOW CONTRADICTS SUPREME COURT PRECEDENT.

This Court has repeatedly emphasized that the exhaustion requirement is "mandatory" and "firm." *Porter v. Nussle*, 534 U.S. 516, 524, 530 (2002); *see also Woodford*, 548 U.S. at 85. In fact, this Court has "consistently refused to authorize judicially created exceptions to the exhaustion requirement," *Johnson v. District of Columbia*, 869 F Supp. 2d 34, 42 (D.D.C. 2012), and has so far rejected every attempt to engraft exceptions onto the PLRA's strict exhaustion requirement. *See Booth*, 532 U.S. at 736 n.4; *Woodford*, 548 U.S. at 91 n.2.

In *Booth v. Churner*, this Court explained that the PLRA did not afford federal courts any "discretion to dispense with administrative exhaustion" when there are available remedies, even when the specific relief the inmates were seeking was not available through the prison's administrative process. *Booth*, 532 U.S. at 734, 739. Although the prisoner contended that "this reading" of the statute was "at odds with traditional doctrines of administrative exhaustion," under which futility is a recognized exception, this Court emphasized that it would "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6.

Similarly, in *Woodford*, the Court held that an inmate must complete "all steps that the agency holds out" and must do so "*properly*." *Woodford*, 548 U.S. at 90 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). In other words, the

PLRA requires completion of "the administrative review process in accordance with the applicable procedural rules, including deadlines." *Id.* at 88. An inmate thus must properly exhaust all available administrative remedies and do so properly, regardless of any mistakes—reasonable or otherwise—that the inmate might make.

This strict rule of "proper exhaustion" precludes ad hoc rules, like the one adopted in the decision below, that allow an inmate to file claims in federal courts even when he did not fully comply with the procedural rules. After all, "substantial compliance and proper exhaustion are not the same," and a reasonable belief exception "is substantial compliance by another name." *Blake*, 787 F.3d at 703 (Agee, J., dissenting).

Furthermore, *Woodford* expressly rejected Justice Stevens's position, in dissent, "that, even if administrative law generally requires proper exhaustion," the prisoner fell "within an exception [from administrative law] to that rule" for constitutional claims. *Woodford*, 548 U.S. at 91 n.2. The Court explained that such an exception would be inconsistent with the purpose of the PLRA to address "a flood of prisoner litigation in the federal courts." *Id.*

The Fourth Circuit's decision ignores the Court's decisions in *Porter* and *Booth*, and pays only lip service to *Woodford*. The only Supreme Court opinion that the *Blake* majority opinion cites to supports its newfound exception is Justice Breyer's lone concurrence in *Woodford*, in which he suggests that the PLRA may incorporate "well-established

exceptions" from administrative law *Woodford*, 548 U.S. at 103-04 (Breyer, J., concurring in the judgment). However, no other member of this Court joined Justice Breyer's opinion, and nothing in this Court's jurisprudence supports this determination. Rather, as this Court reiterated more recently, there is "no question" that "unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007).

III. This Issue Is of Exceptional Importance Because the Decision Below Eviscerates the PLRA's Exhaustion Requirement.

Congress enacted the PLRA "[i]n response to an ever-growing number of prison-condition lawsuits that were threatening to overwhelm the capacity of the federal judiciary." *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 676 (4th Cir. 2005) (citations omitted). These suits reached a high of 41,679 in fiscal year 1995.[3] The National Association of Attorneys General estimated that inmate civil rights suits cost the States at least $81.3 million per year and explained that the vast majority of these costs were attributable to non-meritorious cases. *See* 141 Cong. Rec. S14,417-14,418 (daily ed. Sept. 27, 1995) (Letter from Inmate Litigation Task Force of the National Association of Attorney's General to Senator Robert Dole (Sept. 19, 1995)).

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[3] United States Courts, *Statistics & Reports*, Table C-2—U.S. District Courts–Judicial Business Tables (Sept. 30, 1995).

The PLRA's exhaustion requirement was "[a] centerpiece of the PLRA's effort to reduce the quantity of prisoner suits." *Woodford*, 548 U.S. at 84 (internal quotation marks omitted). Although the total number of prisoner cases has declined since the enactment of the PLRA, meritless and frivolous cases involving prison conditions continue to clog the federal dockets. As this Court has recognized, for instance, "[i]n 2005, nearly 10 percent of all civil cases filed in federal courts nationwide were prisoner complaints challenging prison conditions or claiming civil rights violations. Most of these cases have no merit; many are frivolous." *Jones*, 549 U.S. at 203 (footnote omitted).

The number of new prisoner claims filed in the federal district courts has actually increased over the past two years. *See* Graph at p. 4, *supra*. In fiscal year 2014, for example, prisoners filed a total of 32,036 prison condition and civil rights claims in federal district court.[4] The PLRA's mandatory exhaustion requirement thus continues to be critical to reducing the number of baseless prisoner cases and to enhancing the ability of federal courts to concentrate on potentially meritorious claims. *See Jones*, 549 U.S. at 204.

The Fourth Circuit's broad reasonable belief exception creates an inviting shortcut around this important bulwark, allowing prisoners to circumvent a prison's grievance process by making self-serving

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[4] United States Courts, *Statistics & Reports*, Table C-3—U.S. District Courts–Civil, Judicial Business Tables (Sept. 30, 2014).

claims that they misunderstood the grievance procedures and then placing the burden on the defendant to disprove those claims. *See Blake*, 787 F.3d at 700 (deeming the inmate's belief reasonable, even though he never even read the grievance procedures). As a result, inmates will no longer have the same incentive to exhaust the prison's administrative remedy procedure. "A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction." *Woodford*, 548 U.S. at 95.

The reasonable belief exception thus threatens to turn the PLRA's exhaustion requirement "into a largely useless appendage"—the precise result that this Court has sought to avoid. *Woodford*, 548 U.S. at 93. This is particularly true given how the Fourth Circuit applied its exception here. If a prison's administrative process can be ambiguous merely because it does not explicitly address every possible situation and a prisoner can reasonably interpret a regulation without bothering to read it, prisoners may feel that they have carte blanche to ignore the prison's administrative process. This weakening of the exhaustion requirement will prompt a new flood of claims, which would be the very antithesis of what the PLRA was designed to prevent.

Unless this Court intervenes, the only alternative is for prison officials to "anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Blake*, 787 F.3d at 705 (Agee, J., dissenting). "That

approach," however, "imposes a substantial new burden on state corrections officials." *Id.* It also runs contrary to this Court's pronouncement that the PLRA is supposed to "eliminate unwarranted federal-court interference with the administration of prisons." *Woodford*, 548 U.S at 93. This cannot be what Congress intended, and it is not how this Court has consistently interpreted and applied the PLRA.

This Court should therefore grant certiorari to ensure that the Fourth Circuit's decision does not eviscerate the PLRA's mandatory exhaustion requirement, reopen the floodgates to frivolous prisoner complaints, and thereby thwart the intent of Congress in enacting the PLRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-7279

[Filed May 21, 2015]

SHAIDON BLAKE,
Plaintiff - Appellant,

v.

MICHAEL ROSS, Lt.,
Defendant – Appellee,

and

THE DEPARTMENT OF CORRECTIONS; STATE OF MARYLAND; M.R.D.C.C.; GARY MAYNARD, Sec.; MICHAEL STOUFFER, Comm.; JAMES MADIGAN,
Defendants.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (8:09-cv-02367-AW)

Argued: January 27, 2015

Decided: May 21, 2015

Before TRAXLER, Chief Judge, and GREGORY and AGEE, Circuit Judges.

Reversed and remanded by published opinion. Judge Gregory wrote the majority opinion, in which Chief Judge Traxler joined. Judge Agee wrote a dissenting opinion.

ARGUED Scott Matthew Noveck, MAYER BROWN LLP, Washington, D.C., for Appellant. Sarah W Rice, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

ON BRIEF Reginald R. Goeke, Scott A. Claffee, MAYER BROWN LLP, Washington, D.C., for Appellant. Douglas F Gansler, Attorney General of Maryland, Dorianne Meloy, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

GREGORY, Circuit Judge:

Inmate Shaidon Blake appeals the district court's summary dismissal of his 42 U.S.C. § 1983 claim against Appellee Lieutenant Michael Ross on the ground that Blake failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Because we hold that Blake reasonably believed that he had sufficiently exhausted his remedies by complying with an internal

investigation, we reverse the judgment of the district court and remand for further proceedings.

I.

A.

Since we are reviewing a grant of summary judgment, the following account frames the facts in the light most favorable to Blake, the non-movant, and draws all reasonable inferences in his favor. Pueschel v. Peters, 577 F.3d 558, 563 (4th Cir. 2009). On June 21, 2007, Ross and Lieutenant James Madigan approached Blake's cell at the Maryland Reception Diagnostic and Classification Center. Madigan ordered Blake to gather his possessions so that he could be moved to another cell block. When Blake asked why he was being moved, Madigan called him a "bad ass" and a "tough guy" and accused him of trying to take over the housing unit.

Ross entered the cell and handcuffed Blake's hands behind his back. When Ross escorted Blake out of the cell and towards the top of the stairs, Madigan reached out and grabbed Blake's arm. Blake told Madigan to "[g]et the fuck off" him. Ross got the impression that there might have been some preexisting tension between Blake and Madigan.

Ross, still holding Blake in an escort grip, led Blake down the concrete stairs with Madigan following closely. As he did so, Madigan suddenly shoved Blake from behind. Blake had to push against the railing with his elbow to keep himself from falling down the stairs. Blake told Madigan not to push him. Ross assured Madigan that he had Blake under control and continued walking down the stairs.

At the bottom of the stairs, Madigan shoved Blake again. Blake told Madigan, "Don't fucking push me no more." When they reached the pod door, Madigan ordered Blake to stand against the wall of the corridor. He then stepped into the pod and spoke with the corridor officer inside. When he returned he was "agitated," and he began "yelling and screaming and pointing in [Blake's] face." J.A. 522-23. With Ross still holding Blake against the wall, Madigan wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession. Madigan paused briefly, then punched Blake in the face again.

While Ross continued to hold Blake, Madigan ordered Latia Woodard, a nearby officer, to mace Blake. Woodard refused. Ross told Woodard to radio a "Signal 13" – a code to summon other officers for assistance. He and Madigan then took Blake to the ground by lifting him up and dropping him. Ross dropped his knee onto Blake's chest, and he and Madigan restrained Blake until other officers arrived.

The responding officers took Blake to the medical unit; Blake, surrounded by guards and fearful of being attacked again, declined treatment even though he was in pain. He was later diagnosed with nerve damage.

That same day, Blake reported the incident to senior corrections officers and provided a written account. The Internal Investigative Unit ("IIU") of the Maryland Department of Public Safety and Correctional Services ("Department") undertook a year-long investigation and issued a formal report. The report confirmed that Madigan had used excessive force against Blake by striking him in the face while he

was handcuffed. The report did not assign any fault to Blake and did not recommend any disciplinary action against him.

B.

Blake filed a pro se § 1983 complaint on September 8, 2009 against Ross, Madigan, two supervisors, and three government entities. The district court dismissed sua sponte the claims against the government entities. Ross and the two supervisors filed an answer on November 19, 2009, and moved to dismiss or for summary judgment on February 4, 2010.[1] None of the defendants asserted an exhaustion defense in either the answer or the motion. The district court granted summary judgment as to the supervisors but denied it as to Ross, finding that Blake had presented genuine issues of material fact regarding whether Ross committed a constitutional violation. The court ordered that counsel be appointed to represent Blake.

On August 2, 2011 – nearly two years after filing Ross's answer to Blake's complaint – Ross's counsel contacted counsel for Blake and Madigan and requested consent to file an amended answer. Blake's counsel agreed on the condition that Ross's counsel consent to the filing of an amended complaint at a later date. The parties did not discuss the specific contents of the amended answer, which Blake became aware of for the first time that afternoon when Ross filed his motion to amend. The amended answer included a new affirmative defense alleging that Blake had failed to exhaust his administrative remedies as required by the

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[1] Blake did not successfully serve Madigan until January 26, 2011.

PLRA, 42 U.S.C. § 1997e(a). Less than a day later, without giving Blake any opportunity to object, the district court granted the motion to amend.

Blake moved to strike Ross's exhaustion defense on the ground that it had been waived. While that motion was pending, Blake filed an amended complaint, and Ross reasserted his exhaustion defense in his answer. Blake again moved to strike Ross's exhaustion defense. On January 9, 2012, Ross moved for summary judgment on the ground that Blake had failed to exhaust his administrative remedies. On May 10, 2012, the district court denied Blake's motion to strike and granted summary judgment to Ross and Madigan. Blake filed a motion for reconsideration, in response to which the court reinstated Blake's claim against Madigan (who had not joined Ross's motion), but refused to reinstate his claim against Ross. Blake ultimately prevailed against Madigan at trial. On August 9, 2013, Blake timely appealed the dismissal of his claim against Ross.

II.

On appeal, Blake argues that 1) Ross waived his exhaustion affirmative defense by failing to assert it in his initial answer or motion for summary judgment, and 2) even if Ross did not waive the defense, Blake exhausted his administrative remedies as required by the PLRA by complying with the IIU investigation. Because we find that Ross's exhaustion defense is without merit, we do not reach the issue of whether he waived the defense.

A.

We review de novo the district court's grant of summary judgment, viewing all facts in the light most favorable to the non-movant and drawing all reasonable inferences therefrom in his favor. Pueschel, 577 F.3d at 563. Because an inmate's failure to exhaust administrative remedies is an affirmative defense, Ross bears the burden of proving that Blake had remedies available to him of which he failed to take advantage. Jones v. Bock, 549 U.S. 199, 211-12, 216 (2007); Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008).

B.

The PLRA requires an inmate to exhaust "such administrative remedies as are available" before filing an action. 42 U.S.C. § 1997e(a). This requirement is one of "proper exhaustion": an inmate is not excused from the requirement simply because a previously available administrative remedy is no longer available. Woodford v. Ngo, 548 U.S. 81, 93 (2006). However, "an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." Moore, 517 F.3d at 725.

The Department provides inmates with a number of administrative avenues for addressing complaints and problems. At issue here is the interaction between two of those processes: the Administrative Remedy Procedure ("ARP"),[2] and the IIU.

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[2] We also briefly discuss the Inmate Grievance Office, which hears appeals from the ARP and rules in the first instance on other grievances, supra.

The ARP is available for "all types of complaints" except "case management recommendations and decisions," "Maryland Parole Commission procedures and decisions," "disciplinary hearing procedures and decisions," and "appeals of decisions to withhold mail." Maryland Division of Correction, Inmate Handbook 30 (2007) (hereinafter "Handbook"). The ARP involves a three-step process: the inmate files a request for remedy with the warden, then appeals a denial to the Commissioner of Corrections, and finally appeals any subsequent denial to the Inmate Grievance Office ("IGO"). See id. at 30-31; Md. Code Regs. § 12.07.01.05(B); Chase v. Peay, 286 F Supp. 2d 523, 529 (D. Md. 2003) (describing the process); Thomas v. Middleton, No. AW-10-1478, 2010 WL 4781360, at *3 (D. Md. Nov. 16, 2010) (same).

In addition to the ARP, the Department administers the Internal Investigative Unit, or IIU. The IIU is responsible for investigating, among other things, "allegation[s] of excessive force by an employee or nonagency employee." Md. Code Regs. § 12.11.01.05(A)(3). Any employee with knowledge of an alleged violation within the scope of the IIU's investigative authority must file a complaint. Id. § 12.11.01.09(A). Alternatively, an inmate may file a complaint directly Id. § 12.11.01.09(E).

Blake's encounter with Madigan and Ross was investigated by the IIU after Blake immediately reported the incident to senior corrections officers; Blake never filed an administrative grievance through the ARP Ross contends that the ARP was available to Blake despite his ongoing IIU investigation. Blake argues that the investigation removed his grievance

from the ARP process. To resolve this issue, we first examine in greater detail the legal standard Ross must meet to prove his exhaustion defense, and then apply that standard to Blake's situation.

i.

The Supreme Court has identified three primary purposes of the PLRA's exhaustion requirement: 1) "allowing a prison to address complaints about the program it administers before being subjected to suit," 2) "reducing litigation to the extent complaints are satisfactorily resolved," and 3) "improving litigation that does occur by leading to the preparation of a useful record." Jones, 549 U.S. at 219. To serve these ends, the Court has interpreted the requirement quite strictly to require "proper exhaustion." Woodford, 548 U.S. at 93.

Still, the exhaustion requirement is not absolute. See Moore, 517 F.3d at 725. As Justice Breyer noted in his concurrence in Woodford, administrative law contains "well-established exceptions to exhaustion." 548 U.S. at 103-04 (Breyer, J., concurring). Justice Breyer pointed to the Second Circuit's holding in Giano v. Goord, 380 F.3d 670 (2d Cir. 2004), which applied these well-settled exceptions to the PLRA:

> [T]here are certain "special circumstances" in which, though administrative remedies may have been available and though the government may not have been estopped from asserting the affirmative defense of non-exhaustion, the prisoner's failure to comply with administrative procedural requirements may nevertheless have been justified.

380 F.3d at 676. The court went on to find that the inmate's failure to exhaust available remedies "was justified by his reasonable belief" that no further remedies were available. Id. at 678.

Of course, in reading longstanding administrative law exceptions into the PLRA's exhaustion requirement, the Second Circuit was mindful of the purposes of the PLRA. It therefore developed a two-pronged inquiry: first, whether "the prisoner was justified in believing that his complaints in the disciplinary appeal procedurally exhausted his administrative remedies because the prison's remedial system was confusing," and second, "whether the prisoner's submissions in the disciplinary appeals process exhausted his remedies in a substantive sense by affording corrections officials time and opportunity to address complaints internally." Macias v. Zenk, 495 F.3d 37, 43 (2d Cir. 2007) (emphasis in original) (alterations and internal quotation marks omitted); see also Johnson v. Testman, 380 F.3d 691, 696-97 (2d Cir. 2004). By requiring both a procedural and a substantive component, the Second Circuit has implemented traditional principles of administrative law in a manner consistent with the purposes of the PLRA's exhaustion requirement. The procedural prong ensures that an uncounseled inmate attempting to navigate the grievance system will not be penalized for making a reasonable, albeit flawed, attempt to comply with the relevant administrative procedures. Meanwhile, the substantive prong safeguards a prison from unnecessary and unexpected litigation. We are persuaded that this formulation strikes the appropriate balance between statutory purpose and our administrative jurisprudence. We therefore adopt the

Second Circuit's exception to the PLRA's exhaustion requirement as articulated in Macias and Giano.

ii.

Clearly Blake's IIU investigation satisfied the substantive component of the exception to exhaustion discussed above. The Department conducted a one-year investigation into Blake's violent encounter with Madigan and Ross, at the conclusion of which it issued Madigan an Unsatisfactory Report of Service and relieved him of his duties as a corrections officer.[3] J.A. 375-77 As the dissent notes, post at 26, the investigation "examine[d] employee conduct," which forms the core of Blake's claim under § 1983. Furthermore, the dissent's fears that the Department did not have an adequate chance to address potential complaints against Ross, as opposed to Madigan, are unfounded. Blake did not file a targeted complaint against Madigan, but rather reported the incident as a whole, naming both Madigan and Ross in his account. J.A. 329-33. Investigating officers were well aware of Ross's involvement, and they collected testimony regarding his role in the incident from a number of sources, including a statement from Ross himself. See, e.g., J.A. 289-91, 299-300, 305, 307-11. The Department certainly had notice of Blake's complaint, as well as an opportunity to develop an extensive record and address the issue internally.

The question remains whether Blake's interpretation of the relevant regulations was reasonable. Blake had three formal sources of

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[3] Rather than facing dismissal, Madigan chose to resign. J.A. 566.

information about the administrative grievance process available to him: the Handbook, the Maryland Code of Regulations ("the Regulations"), and the Maryland Department of Correction Directives ("the Directives").[4] The 2007 version of the Handbook contains approximately one page of information about the ARP and the IGO. Handbook 30-31. This page lists "types of complaints" for which the ARP is not available: "case management recommendations and decisions," "Maryland Parole Commission procedures and decisions," "disciplinary hearing procedures and decisions," and "appeals of decisions to withhold mail." Id. at 30. Although this list does not include complaints undergoing internal investigation, it is reasonable to read it as a list of content-based rather than procedural exemptions. Indeed, the Handbook makes no mention of the IIU or the internal investigation process whatsoever; there is no basis for an inmate to conclude that the ARP and IIU processes would be permitted to proceed concurrently.

The Regulations and the Directives are similarly ambiguous. Only one provision of the Regulations mentions both the ARP and the IIU. Md. Code Regs. § 12.11.01.05(B). That provision addresses when an employee involved in the ARP process must report an

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[4] Blake testified that he did not read all of the relevant directives. See J.A. 162-63. We agree with the dissent that an inmate's ignorance of available procedures is not sufficient to excuse a failure to exhaust remedies. That is why, for the purposes of the exception we adopt today, we assume that the inmate possessed all available relevant information when determining whether he held an objectively reasonable belief that he had exhausted all available avenues for relief.

allegation to the IIU, but it says nothing about the disposition of the ARP complaint should the IIU initiate an investigation. And the only directive cited by Ross that mentions both processes is DCD 185-003, which did not take effect until after Blake's encounter with the officers.[5] Therefore, Ross has proffered no evidence that would contradict Blake's belief that the IIU's investigation removed his complaint from the typical ARP process.[6]

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[5] DCD 185-003, which went into effect on August 27, 2008, makes clear that an ARP complaint will be dismissed for procedural reasons "when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit (IIU)," and allows an inmate to appeal that dismissal. Ross argues that this directive proves that Blake could have filed an ARP complaint at the time of the incident. Blake counters that the directive is the first contemplation of a coexistence between the ARP and IIU investigations. Regardless, DCD 185-003 did not exist when the IIU began investigating Blake's complaint, and therefore it is at best tangentially related to whether his belief that he could not pursue an ARP claim was reasonable.

[6] Ross also contends that Blake could have filed a complaint with the IGO in the first instance. The Handbook states that "[t]he IGO reviews grievances and complaints of inmates against the Division of Correction after the inmate has exhausted institutional complaint procedures, such as the Administrative Remedy Procedure." Handbook at 30 (emphasis added). And the Regulations provide that an inmate must file a grievance with the IGO within 30 days of the date that the "[s]ituation or occurrence that is the subject of the grievance took place," unless the grievance is based on an appeal from the ARP or a disciplinary proceeding. Md. Code Regs. §§ 12.07.01.05(A)-(C). Clearly Blake could not appeal from an ARP or disciplinary proceeding; the only complaint he lodged was a report to corrections officers that initiated an IIU investigation. Given that the IIU investigation of

Ross argues that the lack of information in the Handbook, Regulations, and Directives should be read to mean Blake had no reason to believe he could not file an ARP request once the IIU had initiated its investigation.[7] But construing the ambiguities against Blake improperly relieves Ross of his burden of proving his affirmative defense. See Jones, 549 U.S. at 211-12, 216. Furthermore, at the summary judgment stage we must draw all reasonable inferences in favor of Blake, the non-movant. See Pueschel, 577 F.3d at 563. The Handbook, Regulations, and Directives do not contradict Blake's belief that he had exhausted his administrative remedies by reporting the incident to senior corrections officers, thereby initiating an IIU investigation.[8] Furthermore, Ross has provided no practical

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Blake's complaint lasted for a year and was therefore not "exhausted" within 30 days of his encounter, it was certainly reasonable for Blake to believe he could not file a grievance with the IGO.

[7] Alternatively, Ross urges us to affirm the district court on the ground that Ross prevails on the merits. As Blake notes, however, it is typically "more appropriate to allow the district court to consider [alternative grounds for affirmance] in the first instance on remand." Q Int'l Courier, Inc. v. Smoak, 441 F.3d 214, 220 n.3 (4th Cir. 2006); see also McBurney v. Cuccinelli, 616 F.3d 393, 404 (4th Cir. 2010) (declining to address merits of § 1983 claim in the first instance). Therefore, we remand to afford the district court the opportunity to address the merits of Blake's claims.

[8] Blake is not alone in his understanding of the interaction between the ARP and the IIU. In Giano, the Second Circuit found it relevant that "a learned federal district court judge [had] not long ago endorsed an interpretation of DOCS regulations nearly identical to Giano's." 380 F.3d at 679. Here, at least three district court judges have found that an internal investigation removes an

examples of an inmate being allowed to file an ARP or IGO grievance during or after an IIU investigation. Blake reasonably interpreted Maryland's murky inmate grievance procedures, and the IIU investigation into his complaint provided the Department with ample notice and opportunity to address internally the issues raised. We therefore hold that the district court erred in granting summary judgment to Ross on the basis of his exhaustion defense.

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inmate's complaint from the ARP process. See Thomas v. Bell, No. AW-08-2156, 2010 WL 2779308, at *4 & n.2 (D. Md. July 7, 2010); Williams v. Shearin, No. L-10-1479, 2010 WL 5137820, at *2 n.2 (D. Md. Dec. 10, 2010); Bogues v. McAlpine, No. CCB-11-463, 2011 WL 5974634, at *4 (D. Md. Nov. 28, 2011).

Ross argues that these cases are inapposite because they relied on DCD 185-003, which requires dismissal of an ARP complaint if it shares its basis with an IIU investigation. But at least one of these cases was filed before that directive issued. Thomas, 2010 WL 2779308, at *1 (noting that Thomas filed his complaint on August 18, 2008); see also DCD 185-003 (issued and effective on August 27, 2008). Of the remaining two opinions, only one refers (opaquely) to a dismissal under DCD 185-003. See Bogues, 2011 WL 5974634, at *4 (citing an exhibit to the officer's motion to dismiss). The second such opinion reasons that, although the inmate did not file an ARP complaint, the fact that "prison officials were aware of his concerns, convened an internal investigation, and regularly met to review [the inmate's] classification and security status" was sufficient to satisfy the exhaustion requirement. Williams, 2010 WL 5137820, at *2 n.2. Therefore, even if Ross is correct that Blake could have filed a complaint through the ARP while his IIU investigation was pending, the grievance system is confusing enough that at least two learned judges have reached the opposite conclusion.

III.

For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED

AGEE, Circuit Judge, dissenting:

If a prisoner wishes to bring a suit touching on any aspect of "prison life," then he must first exhaust his available administrative remedies. Porter v. Nussle, 534 U.S. 516, 532 (2002); see also 42 U.S.C. § 1997e(a). Although all parties agree that Shaidon Blake's suit concerns prison life, Blake did not avail himself of the very administrative remedy that Maryland designed for this sort of claim -- the Administrative Remedy Procedure ("ARP"). Despite that failure, the majority holds that Blake may proceed with his unexhausted claim in federal court. Because that holding undermines the Prison Litigation Reform Act's ("PLRA") "mandatory" exhaustion requirement, Porter, 534 U.S. at 524, I respectfully dissent, preferring instead to affirm the judgment of the district court dismissing Blake's claim.

I.

Exhaustion is a vital prescription. "What this country needs, Congress [has] decided, is fewer and better prisoner suits." Jones v. Bock, 549 U.S. 199, 203 (2007). Congress designed an "invigorated" exhaustion requirement to achieve that goal. Porter, 534 U.S. at 524. This requirement is a "strict" one, King v. McCarty, 781 F.3d 889, 893 (7th Cir. 2015), compelling a prisoner to use "all available remedies in accordance

with the applicable procedural rules," Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008) (citation and internal quotation marks omitted). A prisoner must proceed through the administrative process even if, for instance, he seeks some relief that the process has no power to afford. See Booth v. Churner, 532 U.S. 731, 740-41 (2001).

Blake did not exhaust his available administrative remedies before filing suit. As the majority notes, the relevant administrative processes in Maryland are set out in various statutes, regulations, and Department of Public Safety and Correctional Services directives. According to one such directive, DCD 185-002, inmates housed in Division of Correction facilities must seek relief for "institutionally related" complaints through an ARP complaint. J.A. 405. "Every inmate" may submit a request for an administrative remedy. J.A. 406. Consistent with the directive, the prisoner handbook explains that the process applies to "all types of complaints" that might arise within the prisons, save four categories of claims. J.A. 403. All parties agree that those categories do not apply here, as they concern inmate classification, parole, inmate discipline, and withholding of mail. J.A. 405-06. Furthermore, DCD 185-002 separately and specifically instructs prisoners to use the ARP to "seek relief for issues that include [u]se of force." J.A. 405. One can hardly imagine a plainer provision that more directly applies to Blake's present claim.

Blake must have been aware of these remedies -- he never even hints that he was not. He received the prisoner handbook in May 2007, along with later "oral communication" on "the system for processing

complaints regarding institutional matters." J.A. 168, 170. See Wright v. Langford, 562 F App'x 769, 776 (11th Cir. 2014) (holding that it was reasonable to presume prisoner's awareness of procedures where he received a handbook spelling out those procedures). The same prisoner handbook indicates that full descriptions of the processes were available in the library. J.A. 403. An administrative remedy coordinator was also available to help. J.A. 409.

That is not to say that it would matter whether Blake was ignorant of the procedures. "[An inmate]'s alleged ignorance of the exhaustion requirement, or the fact that he might have misconstrued the language in the handbook, does not excuse his failure to exhaust." Gonzalez v. Crawford, 419 F App'x 522, 523 (5th Cir. 2011); accord Brock v. Kenton Cnty., Ky., 93 F App'x 793, 797-98 (6th Cir. 2004). After all, we usually do not accept an inmate's "ignorance of the law" as an excuse for non-compliance in other contexts. United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (equitable tolling). Even so, the point warrants emphasis because it gives Blake even less reason to complain of any unfairness here.

Blake mistakenly maintains that he was precluded from seeking relief through the ARP simply because a separate unit of the Department of Corrections conducted an internal investigation into another officer involved in the incident that led to this suit. Blake did not initiate that investigation himself. See J.A. 287 Nor did he believe that he was entitled to learn the investigation's results. See J.A. 161. Even so, Blake somehow decided that the investigation and the ARP were effectively one and the same. He never hints that

prison officials actively misled him into this understanding. Instead, he came to his conclusion all on his own, having never read the directives explaining the ARP See J.A. 162-63.

Had Blake read those directives, this case might have proceeded much differently. For nothing in the relevant guidance -- in the prisoner handbook, directives, regulations, statutes, or otherwise -- suggests that an internal investigation bars or replaces an inmate complaint through the ARP "[T]he prison's requirements," not the prisoner's unjustified speculations, "define the boundaries of proper exhaustion." Jones, 549 U.S. at 218. Because the relevant regulations never mention internal investigations, Blake should not have assumed that such an investigation changed any of the normal rules. Even more so because Maryland instructed inmates to send most "all" of their complaints through the ARP

Other courts agree that an inmate does not satisfy the PLRA's exhaustion requirement simply by participating in an internal investigation. See, e.g., Hubbs v. Cnty. of Suffolk, No. 11–CV–6353(JS)(WDW), 2014 WL 2573393, at *5 (E.D.N.Y. June 9, 2014). The Ninth Circuit relied on the "literal command of the PLRA" in doing so. Panaro v. City of N. Las Vegas, 432 F.3d 949, 953 (9th Cir. 2005). The Sixth Circuit did much the same. See Thomas v. Woolum, 337 F.3d 720, 734 (6th Cir. 2003), abrogated on other grounds by Woodford v. Ngo, 58 U.S. 81, 87 (2007). So too did the Seventh Circuit. See Pavey v. Conley, 663 F.3d 899, 905 (7th Cir. 2011). These cases and others impliedly recognize that prisoner grievance proceedings and internal investigations serve different and not entirely

consistent purposes. Perhaps just as importantly, the cases acknowledge that prisoners are not "permitted to pick and choose how to present their concerns to prison officials." Id.

In sum, Blake failed to exhaust "available" "administrative remedies" by failing to file a complaint through the ARP 42 U.S.C. § 1997e(a). The internal investigation made no difference.

II.

Blake's failure to exhaust also cannot be overlooked merely because he is said to have "reasonably interpreted Maryland's murky inmate grievance procedures." Maj. op. at 16. How could Blake have reasonably interpreted procedures that were available to him but that he never bothered to read?

More to the point, this reasonable-interpretation exception to the PLRA's exhaustion requirement rests on two unsupportable ideas. First, the prisoner's subjective beliefs largely do not matter when determining whether the prisoner exhausted his administrative remedies. See Napier v. Laurel Cnty., Ky., 636 F.3d 218, 221 n.2 (6th Cir. 2011); Thomas v. Parker, 609 F.3d 1114, 1119 (10th Cir. 2010); Twitty v. McCoskey, 226 F App'x 594, 596 (7th Cir. 2007); Lyon v. Vande Krol, 305 F.3d 806, 809 (8th Cir. 2002) (en banc) ("[Section] 1997e(a) does not permit the court to consider an inmate's merely subjective beliefs, logical or otherwise, in determining whether administrative procedures are 'available.'"). Yet the reasonable-interpretation approach makes such belief the lynchpin of the analysis. And second, substantial compliance and proper exhaustion are not the same. See Thomas, 609

F.3d at 1118; Lewis v. Washington, 300 F.3d 829, 834 (7th Cir. 2002); Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001). Yet the reasonable-exhaustion exception is substantial compliance by another name.

The PLRA's exhaustion requirement may not even be amenable to any exceptions. The Act requires a prisoner to "us[e] all steps that the agency holds out[] and do[] so properly." Woodford, 548 U.S. at 90 (citation and internal quotation marks omitted). That rather restrictive definition of exhaustion seems inconsistent with ad hoc exceptions like one premised on a prisoner's "reasonable" mistake, where the prisoner has admittedly not used "all steps." Judge-made exceptions may be permissible when interpreting judge-made exhaustion doctrines, see, e.g., Reiter v. Cooper, 507 U.S. 258, 269 (1993), but they hardly seem appropriate where, as here, we are dealing with Congressional text. "Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 501 (1982), and a "court may not disregard these requirements at its discretion," Hallstrom v. Tillamook Cnty., 493 U.S. 20, 31 (1989). And pragmatic reasons suggest that ad hoc, "belief"-focused exceptions should be avoided, as they force courts to undertake the "time-consuming task" of probing "prisoners' knowledge levels of the grievance process at given points in time." Graham v. Cnty. of Gloucester, Va., 668 F Supp. 2d 734, 740 (E.D. Va. 2009).

A reasonable-interpretation exception might trace back to administrative law, maj. op. at 10, but that offers a questionable pedigree. "[A]lthough courts have

read the PLRA to call for administrative-law-style exhaustion, they have not imported the corresponding exceptions." Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1652 (2003). Certainly at the Supreme-Court level, attempts to engraft exceptions that derive from the "traditional doctrines of administrative exhaustion" onto the PLRA's statutory exhaustion requirement have failed. Booth, 532 U.S. at 741 n.6; see also Woodford, 548 U.S. at 91 n.2 (rejecting the dissent's suggestion to apply an exception to the PLRA exhaustion requirement derived from administrative law). Justice Breyer once suggested a link between administrative law exceptions and the PLRA, see maj. op. at 10, but no majority of justices ever sanctioned that view. Even the Second Circuit, which may have at one time provided perhaps the only precedent supporting a reasonable-interpretation exception, now recognizes that such exceptions may no longer be viable in light of more recent Supreme Court decisions. See Amador v. Andrews, 655 F.3d 89, 102-03 (2d Cir. 2011) (questioning whether a reasonable-interpretation exception survives Woodford and citing several other Second Circuit opinions doing the same).

All that aside, Blake does not meet the standards that evidently apply to this new reasonable-interpretation exception. The majority says that the exception will apply when a prisoner's submissions serve the same "substantive" purposes as proper exhaustion. Maj. op. at 10-11 (emphasis omitted). Furthermore, the prisoner must have been "justified" in believing that he was following the proper procedures. Id. Here, neither proves to be the case.

Blake did not fulfill any of the substantive purposes served by proper exhaustion by involving himself in an internal investigation. That investigation examines employee conduct, not the merits of the inmate's specific grievance. It also is not a means of dispute resolution or settlement, but instead a simple exercise of the institution's role as an employer. And the inmate plays a limited role in the investigation, providing only a factual statement. In contrast, exhaustion is intended to "allow[] prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court." Jones, 549 U.S. at 204. It also "reduc[es] litigation to the extent complaints are satisfactorily resolved, and improv[es] litigation that does occur by leading to the preparation of a useful record." Id. at 219.

The internal investigation here did not fulfill these purposes for several reasons. For one thing, the internal investigation focused on the actions of corrections officer James Madigan, who the Department of Public Safety and Correctional Services identified as the only relevant "suspect." J.A. 287 It largely did not examine the actions of the only remaining defendant in this appeal, Michael Ross, and did not offer any opportunity to "resolve" a dispute about Ross' acts. Nor did it produce a useful administrative record, as the internal investigation report largely treats Ross as a peripheral bystander See J.A. 287-400. Indeed, the few references to Ross largely consist of passing mentions that Blake was "being escorted" by Ross. See, e.g., J.A. 289. Moreover, other evidence that would have been useful in this suit, like a contemporaneous medical examination of Blake, was not gathered during the investigation.

Administratively settling Blake's claims was also out of the question, as the internal investigation did not offer direct relief to an inmate. See Pavey, 663 F.3d at 905 ("An internal-affairs investigation may lead to disciplinary proceedings targeting the wayward employee but ordinarily does not offer a remedy to the prisoner who was on the receiving end of the employee's malfeasance."). And, at bottom, it should not be forgotten that Blake failed to file a "targeted complaint," maj. op. at 12, because he failed to file any complaint. He cannot claim credit for "report[ing] the incident," id., as another corrections officer -- Captain James Vincent -- did that. See J.A. 157-58, 287, 291. In fact, at one point, Blake actually "request[ed] that no investigation be conducted and that the matter be considered CLOSED." J.A. 398.

It overstates the facts to say that the internal investigation provided "notice of Blake's complaint." Maj. op. at 12. The account that Blake provided as part of the internal investigation focused on Madigan, not Ross. See J.A. 329-33. Thus, Blake did not provide relevant notice of the "source of the perceived problem." McCollum v. Cal. Dep't of Corr. & Rehab., 647 F.3d 870, 876 (9th Cir. 2011). And prison officials had no notice that Blake would file a suit premised on anything Ross did, as Blake disclaimed any intent to sue anyone. See J.A. 332-33 ("I will not be going any further with this situation outside this institution."). In any event, affording "notice" would not be enough. "[N]otice to those who might later be sued has not been thought to be one of the leading purposes of the exhaustion requirement." Jones, 549 U.S. at 219. Here again, even the Second Circuit recognizes as much. See

Macias v. Zenk, 495 F.3d 37, 44 (2d Cir. 2007) ("[A]fter Woodford, notice alone is insufficient[.]").

Nor did Blake satisfy the "procedural prong" of the exception, which apparently requires the inmate to rely on a "reasonable" "interpretation of the relevant regulations." Maj. op. at 12. It hardly bears repeating that the regulations were clear and Blake had no basis to misconstrue them. This case did not involve inmate discipline, parole, mail, or inmate classification, so Blake's claim was not explicitly excluded from the ARP Contrast with Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (applying the reasonable-interpretation exception where the inmate mistakenly but reasonably believed that his claim fell into a category of claims explicitly excluded from the ordinary grievance process). The ARP applied to all inmates, to all claims of use of force, at all relevant times. Blake acted unreasonably in purportedly interpreting the regulations otherwise. Indeed, at least toward the beginning of this case, even Blake seemed to understand that the internal investigation and the ARP were separate. He explained then that, in his view, the internal investigation made it unnecessary to resort to the ARP See J.A. 162-63. But he never once suggested that the investigation precluded him from filing a complaint.

Furthermore, the relevant procedures were not "ambiguous" merely because they did not specifically describe how an internal investigation might affect a complaint lodged through the ARP See maj. op. at 13. When a policy like the ARP ostensibly reaches "all" complaints, and that same policy says nothing about an entirely separate process, the obvious inference is that

the latter process is untethered from the former. But the majority puts aside this clear assumption in favor of an ambiguous approach to prison regulation. Now, jail officials must anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing. That approach imposes a substantial new burden on state corrections officials. It also finds no support in the law. To the contrary, more than one court has held that prison officials are not responsible for telling prisoners anything about the available administrative remedies. See, e.g., Yousef v. Reno, 254 F.3d 1214, 1221 (10th Cir. 2001); cf. Johnson v. Dist. of Columbia, 869 F Supp. 2d 34, 41 (D.D.C. 2012) ("[T]he majority of courts have held that an inmate's subjective lack of information about his administrative remedies does not excuse a failure to exhaust."). In addition, prison administrators might now feel compelled to adopt overly complicated administrative procedures out of a justifiable fear that any regulatory silence will be used against them. That could in turn produce even more confusion among prisoners.

Prior district court cases also do not render Blake's supposed misunderstanding "reasonable." Maj. op. at 15 n.8. Certainly Blake did not rely on these opinions directly. He could not have, as the opinions do not interpret the policies that applied to Blake's present claim. Rather, all of those cases were looking to a new department directive that went into effect on August 27, 2008, long after the time when Blake needed to file his administrative complaint. See Williams v. Shearin, No. L–10–1479, 2010 WL 5137820, at *2 & n.2 (D. Md. Dec. 10, 2010) (addressing events arising in December

2009); Bogues v. McAlpine, No. CCB-11-463, 2011 WL 5974634, at *4 (D. Md. Nov. 28, 2011) (citing "Ex. 4," an administrative decision that dismissed the inmate's complaint under the 2008 directive); Thomas v. Bell, No. AW–08–2156, 2010 WL 2779308, at *4 n.2 (D. Md. July 7, 2010) (citing an exhibit in another case that proves to be an administrative decision dismissing a complaint under the 2008 policy). The 2008 directive provides that a complaint submitted through the ARP must be dismissed when "the basis of the complaint is the same basis of an investigation under the Internal Investigative Unit." J.A. 437. Of course, the procedure before us here says no such thing, so these district court cases are irrelevant.

In short, a reasonable-interpretation exception does not excuse Blake's failure to exhaust. The district court appropriately declined to apply that kind of an exception here.

III.

One last matter may be easily resolved: Ross did not waive his exhaustion defense by waiting to raise it. Because PLRA exhaustion is an affirmative defense, Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 683 (4th Cir. 2005), it may be waived by a defendant who fails to timely assert it, see, e.g., Ga. Pac. Consumer Prods., LP v. Von Drehle Corp., 710 F.3d 527, 533 (4th Cir. 2013). Here, Ross did not include the exhaustion defense in his initial answer. But he did seek and obtain consent from Blake (through counsel) to file an amended answer containing the affirmative defense. Blake did not condition his consent in any relevant way or even ask to review the proposed answer before it was filed. He cannot now

complain about untimeliness when he blindly approved the untimely filing. See Corwin v. Marney, Orton Inv., 843 F.2d 194, 199 (5th Cir. 1988); cf. Mooney v. City of N.Y., 219 F.3d 123, 127 n.2 (2d Cir. 2000) (holding that the plaintiff's implied consent to an amended answer excused the defendant's initial failure to raise an affirmative defense in its answer). The time to object was before the amendment was made. Having failed to do so, Blake was required to face up to Ross' defense on its merits.

IV

For these many reasons, we should affirm the district court's judgment. Maryland's ARP was available to Blake and he did not use it. We should not now allow his unexhausted claim to go forward. I respectfully dissent from the majority's choice to do otherwise.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. 8:09-cv-02367-AW

[Filed November 14, 2012]

SHAIDON BLAKE,	)
Plaintiff,	)
	)
v.	)
	)
GARY MAYNARD *et al.*,	)
Defendants.	)
	)

MEMORANDUM OPINION

Plaintiff Shaidon Blake brings this action against Defendants Michael Ross and James Madigan. Plaintiff asserts § 1983 claims for excessive force and deliberate indifference. Pending is Plaintiff's Motion for Reconsideration. On November 2, 2012, the Court held a hearing on said Motion. For the reasons articulated herein, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Reconsideration.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court extracts the following facts from its Memorandum Opinion of May 10, 2012 (May 2012 Opinion), updating them to reflect subsequent developments in the record. This case arises from a beating Plaintiff sustained at the hands of a prison guard. Plaintiff Shaidon Blake, a/k/a Shamvoy Smith, is an inmate of the Maryland Division of Correction (DOC). Defendants James Madigan and Michael Ross are prison guards and were involved in the series of events leading to the instant dispute. Although Blake sued other individuals in his initial Complaint, the Court has erstwhile dismissed them. *See* Doc. No. 32 at 8–9.

On June 21, 2007, Blake received a notice of infraction based on allegations that he interrupted the orderly use of the telephone in Maryland Reception, Diagnostic, and Classification Center (MRDCC) Unit 7C. In connection with this incident, Madigan and Ross went to Blake's cell, handcuffed him, and escorted him out of his cell. Ross held Blake by the arm and Blake offered no resistance. Ross and Blake proceeded to the concrete staircase that leads to the lower part of Unit 7C with Madigan trailing behind. The trio reached the staircase and started to descend, whereupon Madigan shoved Blake from behind. Ross thereupon told Madigan that he had Blake under control.

Eyewitness accounts diverge sharply at this point. In essence, Defendants contend that the trio stopped moving toward the segregation unit and Madigan "unexpectedly punched Mr. Blake in the face several times in quick succession." Doc. No. 94-1 at 6. In

contrast, Blake asserts that there was a "clear buildup to the assault at issue." Doc. No. 96 at 4. After this alleged buildup, Blake contends that Madigan punched him in the face several times with a "fist clenched over a key ring." *Id.* Blake also asserts that there were intermittent pauses during the assault.

Madigan then ordered the hallway officer, Latia Woodard, to mace Blake, which she refused. Instead, Woodard issued a "Signal 13" code over the radio, thereby summoning the assistance of other correctional officers.

The Parties' stories diverge at this point as well. The Parties agree that, in one way or the other, Ross took Blake to the ground. Defendants assert that Ross and Madigan "attempted to bring Mr. Blake to the floor" and that the three tripped and fell during the process. Doc. No. 94-1 at 7. Ross's alleged motive in taking Blake to the floor was to "demonstrate control over Mr. Blake so that the other arriving officers would not continue to escalate the use of force against Mr. Blake." *Id.* For his part, Blake insists that Madigan and Ross picked him up and slammed him violently to the ground on his head. Doc. No. 96 at 5. Blake further asserts that Ross "dropped his knee on Blake's chest." *Id.*

Thereafter, Blake was taken to the medical unit. Blake received a preliminary examination, after which he returned to his cell. The incident was referred to the Internal Investigative Unit (IIU) of the Department of Public Safety and Correctional Services (DPSCS). The IIU conducted an investigation and completed a comprehensive report. The IIU report concluded that, inter alia, Madigan used excessive force during the

incident described above. Consequently, Madigan was charged with various violations, a process that culminated in his entering into a settlement agreement pursuant to which he resigned in lieu of being fired.

On September 8, 2009, Blake filed a pro se Complaint asserting a § 1983 claim based on Madigan's attack and the surrounding events. Doc. No. 1. On February 4, 2010, Ross, among others, filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Motion to Dismiss).[1] On September 9, 2010, the Court issued a Memorandum Opinion that, while granting the Motion in relation to other Defendants, denied it as to Ross. Doc. No. 32. In the September 2010 Opinion, the Court rejected the contention that Ross was entitled to qualified immunity, concluding that genuine issues of material fact existed concerning whether he had unconstitutionally failed to intervene. *See id.* at 7–8.

On August 2, 2011, Ross filed a Consent Motion for Leave to Amend his Answer to the Complaint (Consent Motion to Amend Answer). Doc. No. 66. Ross's proposed amended answer asserted some new defenses, including that Ross had failed to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA). Later that month, despite having consented to Ross's amendment, Blake filed a Motion to Strike Certain of Ross's Affirmative Defenses (Motion to Strike Certain Defenses), arguing that Ross waived the right to raise them by failing to do so earlier

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[1] Madigan was not in the case at this point. Madigan has since answered. Doc. No. 53. Madigan has not moved for summary judgment or otherwise sought to have the action dismissed.

in the proceeding. Doc. No. 74. Blake subsequently lodged an Amended Complaint via consent motion, thus mooting his Motion to Strike Certain Defenses. *See* Doc. Nos. 78-1, 85. Ross answered the Amended Complaint. Doc. No. 84. Ross's answer restates the affirmative defense of failing to exhaust administrative remedies under the PLRA.

On October 24, 2011, Blake filed a Motion to Strike Defendant Ross's Fifth Affirmative Defense (Motion to Strike). Doc. No. 87 In this Motion, as in the Motion to Strike Certain Defenses, Blake sought to strike Ross's PLRA defense on a waiver theory.

On January 9, 2012, Ross filed a Motion for Summary Judgment. Doc. No. 94. Ross pressed two primary arguments in this Motion: (1) that Blake failed to exhaust administrative remedies; and (2) that the evidence was insufficient to support Blake's § 1983 excessive force and deliberate indifference claims.

On May 10, 2012, the Court issued a Memorandum Opinion and Order (May 2012 Opinion) denying Blake's Motion to Strike and granting Ross's Motion for Summary Judgment. In granting Ross's Motion for Summary Judgment, the Court held that Blake failed to exhaust administrative remedies inasmuch as he failed to file a complaint with the Inmate Grievance Office (IGO). The Court also held that, as a matter of general statutory construction of the Prison Litigation Reform Act (PLRA), the DPSCS' internal investigation failed to justify Blake's failure to exhaust administrative remedies. In denying Blake's Motion to Strike, the Court carefully reviewed the record and determined that Ross properly raised the failure to exhaust defense in a responsive pleading and that

Blake could show no prejudice because of Ross's somewhat belated assertion of the defense.

On June 4, 2012, Blake filed a Motion for Reconsideration of the Court's May 2012 Opinion. Doc. No. 101. Ross originally filed no response to this Motion. However, before ruling on this Motion, the Court deemed it advisable to schedule a hearing. Subsequently, Ross responded to the Motion, and it has become ripe. By and large, Blake's Motion for Reconsideration rehashes arguments that the Court rejected in its May 2012 Opinion.

The Motion for Reconsideration, however, does raise a few novel arguments. For instance, Blake asserts that the Court's decision prejudices him inasmuch as it portends to create a statute of limitations bar. Blake also contends that the Court's May 2012 Opinion was overbroad insofar as it applied to Madigan, who failed to move for summary judgment, failed to assert the failure to exhaust defense until the recent hearing, and whose liability has never seriously been in dispute.

II. STANDARD OF REVIEW

Blake seeks reconsideration of the Court's May 2012 Opinion under Rule 59(e) of the Federal Rules of Civil Procedure. "While the Rule itself provides no standard for when a district court may grant such a motion, courts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081

(4th Cir. 1993). Only ground (3) is relevant to the instant Motion.

III. LEGAL ANALYSIS

A. Blake's Claims Against Madigan

Blake argues that the Court improperly dismissed his claims against Madigan because Madigan failed to raise the defense of failure to exhaust. Blake also argues that dismissal of his claims against Madigan for failing to exhaust administrative remedies was improper because (1) Madigan did not move for summary judgment and (2) Madigan's liability is not seriously in dispute.

The Court agrees with Blake's first argument. The Court's May 2012 Opinion was overbroad in that it seemed to apply, sua sponte, Ross's failure to exhaust defense to Blake's claims against Madigan. Failure to exhaust administrative remedies is an affirmative defense for which Madigan bore the burden of proof. *Jones v. Bock*, 549 U.S. 199, 212 (2007); *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008) (citations omitted). Furthermore, "a party's failure to raise an affirmative defense in the appropriate pleading [usually] results in waiver " *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999). Additionally, the Fourth Circuit has held that, although district courts may raise the issue of exhaustion of administrative remedies under the PLRA sua sponte, "a district court cannot dismiss the complaint without first giving the inmate an opportunity to address the issue." *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 682–83 (4th Cir. 2005).

In this case, Madigan failed to raise the failure to exhaust defense in his answer, failed to move for summary judgment, and failed to respond to Blake's Motion for Reconsideration. Indeed, Madigan failed to argue that Ross's failure to exhaust defense applied to him until the recent hearing. Therefore, Madigan waived the right to assert the failure to exhaust defense. Furthermore, as Madigan never raised the defense, it is hard to see how he carried the burden of proof. Moreover, even if sua sponte dismissal were otherwise proper, the Court did not give Blake the required notice.

For these reasons, the Court grants Blake's Motion for Reconsideration as to Madigan. The Court will reopen the case and allow Blake to proceed with his excessive force claim against Madigan. This disposition moots Blake's alternative argument.

B. Blake's Claims Against Ross

Blake makes a series of arguments purporting to demonstrate that the Court erred in granting summary judgment in Ross's favor. The Court addresses these arguments one by one.

1. Whether Ross Waived the Right to Assert the Failure to Exhaust Defense

Blake argues that the Court erred in its determination that Ross did not waive his right to assert the PLRA defense considering his somewhat belated raising of it. The Court rejects this argument for the reasons stated in its May 2012 Opinion. As noted therein, Ross properly raised the defense in a consent motion to amend his answer. Furthermore, Blake later filed a consent motion to amend his

complaint, in response to which Ross again properly raised the PLRA defense.

The Court also determined in its May 2012 Opinion that Blake had failed to show prejudice sufficient to support a finding of waiver. Blake now argues that Ross's somewhat belated raising of the defense will prejudice him inasmuch as it will create a statute of limitations bar. Blake asserts that the statute of limitations will have expired by the time he exhausts administrative remedies and refiles his suit against Ross.

This argument fails for reasons at once procedural and substantive. In terms of procedure, Blake neglected to raise this argument in his opposition to Ross's Motion for Summary Judgment even though he easily could have envisioned this eventuality. Considering this omission, even if one assumes that the prospect of a time-bar is a relevant consideration in terms of prejudice, the Court's previous determination does not constitute a clear error of law.

As for substance, the purported prejudice of which Blake complains is prejudice of his own doing. Had Blake exhausted administrative remedies before filing suit, he would not face the prospect of having to exhaust administrative remedies and then refiling suit. Consequently, the prejudice Blake now faces is hardly different than the prejudice a plaintiff confronted with a meritorious PLRA defense inevitably faces. Furthermore, it is somewhat speculative to conclude that Blake would have managed to exhaust administrative remedies before the expiration of the statute of limitations had Ross raised said defense earlier.

Additionally, under well-settled Fourth Circuit precedent, plaintiffs may raise the PLRA defense on motion for summary judgment. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999). Likewise, courts may raise the issue of exhaustion of remedies on its own motion. *Anderson*, 407 F.3d at 682. Motions for summary judgment may be filed quite some time after the commencement of a case. So too may courts raise the issue of exhaustion at a later stage in the proceedings. Therefore, at least in some cases, Fourth Circuit precedent contemplates that dismissing inmate suits on failure to exhaust grounds may lead to a limitations bar.

For the foregoing reasons, the Court committed no error in determining that Ross did not waive his PLRA defense.

2. *Whether the DPSCS' Internal Investigation Excused Blake from Exhaustion*

Rehashing an argument already raised and rejected, Blake argues that the DPSCS' internal investigation excused him from filing an administrative grievance as a matter of general statutory construction. The Court rejects this argument for the reasons stated in its May 2012 Opinion. As the Court noted in its Opinion, the Sixth, Seventh, and Ninth Circuits have addressed this very question and held that the commencement of an internal investigation does not relieve prisoners from the PLRSA's exhaustion requirement.

Blake responds that a few cases from the District of Maryland dictate a different result, including this Court's decision in *Thomas v. Bell*, Civil Action Nos. AW-08-2156, AW-08-3487, AW-09-1984, AW-09-2051,

2010 WL 2779308, at *3 (D. Md. July 7, 2010). *See also Bogues v. McAlpine*, Civil Action No. CCB–11–463, 2011 WL 5974634, at *4 (D. Md. Nov. 28, 2011); *Williams v. Shearin*, Civil No. L–10–1479, 2010 WL 5137820, at * 2 n.2 (D. Md. Dec. 10, 2010). However, these cases are unreported and are not as carefully reasoned as the Circuit authority mentioned above. Furthermore, *Thomas* and *Bogues* relied on a version of the Department of Correction Directives (DCD) that was not in effect at the time of the alleged assault. *See* DCD 185-003.VI.N.4 (Aug. 27, 2008). For its part, *Williams* does not cite any authority in reaching the conclusion that the commencement of an internal investigation precludes dismissal for the failure to exhaust.

Accordingly, Blake's counterarguments are not well-taken. The DPSCS' internal investigation did not excuse Blake from exhausting administrative remedies.

3. The Relationship, or Lack Thereof, of the IGO and ARP Processes

Blake argues that the Court's reasoning that the IGO and ARP processes are legally distinct is unsound. As explained below, this is a mischaracterization of the Court's reasoning.

Maryland law implements an inmate grievance process that generally consists of three levels. The first level is called the Administrative Remedy Procedure (ARP). The ARP "is a formal way to resolve complaints or problems that an inmate has been unable to resolve informally." Md. Div. of Corr., Inmate Handbook 30 (2007), http://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf. Usually, the

ARP process involves filing a request for administrative remedy with the warden of the institution in which the inmate is incarcerated. *See id.*; *Chase v. Peay*, 286 F Supp. 2d 523, 529 n.10 (D. Md. 2003). The second step, for its part, entails appealing the warden's decision to the Commissioner of Correction. *See id.*; *Chase*, 286 F Supp. 2d at 529 n.10. The third, and final, step occasions appealing the Commissioner's decision to the Inmate Grievance Office (IGO). *See id.*, *Chase*, 286 F Supp. 2d at 529 n.10.

Blake argues that the Court's statement that the IGO process is "legally and practically distinct" from the ARP process contradicts its conclusion that prisoners must exhaust the IGO process when the ARP process is unavailable. Blake suggests that the IGO and ARP process are mutually exclusive such that the exhaustion of one obviates the need to exhaust the other.

Contrary to Blake's contentions, the Court expressly noted that the IGO grievance procedure is generally interrelated with the ARP process. The Court explained that the IGO process is the default process under Maryland law and applies to inmate grievances except when the ARP process is applicable. The Court then determined that, consistent with Blake's own contentions, the ARP process was inapplicable to his grievance because of the DPSCS' internal investigation. *See* Md. Code Ann., Corr. Servs. § 10-206(a); COMAR 12.07.01.02D. Therefore, this argument lacks merit.

4. Whether the Court Erred By Relying on the Wrong Version of a Directive

In a footnote, Blake argues that the Court erred by relying on DOC directives that were not in effect when the underlying assault took place. Specifically, Blake observes that the Court relied on DCD 185-003.VI.N.4 for the proposition that the internal investigation removed Blake's complaint from the ARP process, with the result that he had to pursue the default IGO process. Blake further notes that the DOC issued this directive on August 27, 2008, which is after the occurrence of the underlying assault. Blake concludes that the Court should reconsider its Opinion on this basis.

The Court disagrees. Although Blake correctly observes that DCD 185-003.VI.N.4 was not in effect when the assault took place, Plaintiff fails to explain how this excuses Blake's admitted failure to file a grievance with the warden or the IGO. Blake concedes that he was aware of the ARP process and was in possession of an inmate handbook detailing the process. Blake's only proffered excuse for his failure to file an ARP grievance is that, in his subjective belief, the DPSCS' internal investigation relieved him from this requirement.

Furthermore, the DOC directive that was in effect at the time of the assault appears to authorize inmates to use either the ARP or IGO process to file grievances based on the "[u]se of force." *Compare* DCD 185-002.IV.C.6, *with* DCD 185-002.IV.R (Feb. 15, 2005). Thus, the Court's misplaced reliance on DCD 185-003.VI.N.4 failed to prejudice Blake and the Court

affirms its determination that Blake failed to exhaust administrative remedies.

5. Whether Blake's Failure to Exhaust Administrative Remedies Was Justified Due to Ambiguity in Maryland's Remedy Procedures

The argument fails for essentially the same reasons as the prior one. There is very little, if any, ambiguity in Maryland's inmate grievance procedures. At the time of the assault, the DOC directives and inmate handbook gave Blake ample notice of his requirement to exhaust administrative remedies. Accordingly, this argument lacks merit.

6. Whether to Reopen and Stay the Case to Prevent a Statute of Limitations Bar

Blake requests the Court to reopen and stay the case even if it otherwise denies his Motion for Reconsideration to obviate a time-bar. The Court denies this request. Generally, courts lack discretion to stay prison-conditions suits under the PLRA. *See Boeh v. Horning*, Civil Action No. RDB-09-2365, 2010 WL 997056, at *3 (D. Md. Mar. 16, 2010). Furthermore, due to Blake's admitted failure to even attempt to exhaust administrative remedies, this case presents no overriding considerations of fairness. Therefore, the Court declines to reopen and stay the case.

7 Whether to Equitably Toll the Statute of Limitations

Alternatively, Blake asks the Court to equitably toll the statute of limitations while he tries to exhaust administrative remedies. The Court denies this request

as well. Generally, a prisoner "is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (citation and internal quotation marks omitted). Here, Blake has not shown that he has pursued his rights diligently. Moreover, Blake has failed to identify an extraordinary circumstance that prevented him from exhausting administrative remedies. To reiterate, Blake has conceded that he decided not to exhaust remedies only because of his subjective belief that he faced no such requirement. Moreover, the applicable DOC directives and inmate handbook clearly spelled out Maryland's administrative remedy procedures. Accordingly, the Court declines to equitably toll the statute of limitations.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Blake's Motion for Reconsideration. A separate Order follows.

November 14, 2012
Date

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

Civil Action No. 8:09-cv-02367-AW

[Filed November 14, 2012]

SHAIDON BLAKE,	)
Plaintiff,	)
	)
v.	)
	)
GARY MAYNARD *et al.*,	)
Defendants.	)
	)

ORDER

In accordance with the accompanying Memorandum Opinion, IT IS this **14th day of November, 2012**, by the U.S. District Court for the District of Maryland, hereby **ORDERED**:

1. That the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Reconsideration (Doc. No. 101). Consequently:

- The Court **VACATES IN PART** its Memorandum Opinion and Order of May 10, 2012 (Doc. No. 99);

• The Court **REOPENS** the case and **REINSTATES** Plaintiff's claims against Defendant Madigan;

• That Court **AFFIRMS** its May 10, 2012 Memorandum Opinion and Order in relation to Defendant Ross;

2. That Plaintiff and Defendant Madigan contact chambers at (301) 344-0637 within **seven (7) days** to schedule a trial date; Plaintiff shall initiate the call;

3. That the Clerk transmit a copy of this Order to all counsel of record.

November 14, 2012
Date

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. 8:09-cv-02367-AW

[Filed May 10, 2012]

SHAIDON BLAKE,)
Plaintiff,)
)
v.)
)
GARY MAYNARD *et al.*,)
Defendants.)
)

MEMORANDUM OPINION

Plaintiff Shaidon Blake brings this action against Defendants Michael Ross and James Madigan. Plaintiff asserts § 1983 claims for excessive force and deliberate indifference. Outstanding are Plaintiff's Motion to Strike and Defendant Michael Ross's Motion for Summary Judgment. The Court has reviewed the entire record and finds no hearing necessary. For the reasons that follow, the Court **DENIES** Plaintiff's Motion to Strike and **GRANTS** Defendant Ross's Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a beating Plaintiff sustained at the hands of a prison guard. Plaintiff Shaidon Blake, a/k/a Shamvoy Smith, is an inmate of the Maryland Division of Correction (DOC). Defendants James Madigan and Michael Ross are prison guards and were involved in the series of events leading to the instant dispute. Although Blake sued other individuals in his initial Complaint, the Court has erstwhile dismissed them. *See* Doc. No. 32 at 8–9.

On June 21, 2007, Blake received a notice of infraction based on allegations that he interrupted the orderly use of the telephone in Maryland Reception, Diagnostic, and Classification Center (MRDCC) Unit 7C. In connection with this incident, Madigan and Blake went to Blake's cell, handcuffed him, and escorted him out of his cell. Ross held Blake by the arm and Blake offered no resistance. Ross and Blake proceeded to the concrete staircase that leads to the lower part of Unit 7C with Madigan trailing behind. The trio reached the staircase and started to descend, whereupon Madigan shoved Blake from behind. Ross thereupon told Madigan that he had Blake under control.

Eyewitness accounts diverge sharply at this point. In essence, Defendants contend that the trio stopped moving toward the segregation unit and Madigan "unexpectedly punched Mr. Blake in the face several times in quick succession." Doc. No. 94-1 at 6. In contrast, Blake asserts that there was a "clear buildup to the assault at issue." Doc. No. 96 at 4. After this alleged buildup, Blake contends that Madigan punched

him in the face several times with a "fist clenched over a key ring." *Id.* Blake also asserts that there were intermittent pauses during the assault.

Madigan then ordered the hallway officer, Latia Woodard, to mace Blake, which she refused. Instead, Woodard issued a "Signal 13" code over the radio, thereby summoning the assistance of other correctional officers.

The Parties' stories diverge at this point as well. The Parties agree that, in one way or the other, Ross took Blake to the ground. Defendants assert that Ross and Madigan "attempted to bring Mr. Blake to the floor" and that the three tripped and fell during the process. Doc. No. 94-1 at 7. Ross's alleged motive in taking Blake to the floor was to "demonstrate control over Mr. Blake so that the other arriving officers would not continue to escalate the use of force against Mr. Blake." *Id.* For his part, Blake insists that Madigan and Ross picked him up and slammed him violently to the ground on his head. Doc. No. 96 at 5. Blake further asserts that Ross "dropped his knee on Blake's chest." *Id.*

Thereafter, Blake was taken to the medical unit. Blake received a preliminary examination, after which he returned to his cell. The incident was referred to the Internal Investigative Unit (IIU) of the Department of Public Safety and Correctional Services (DPSCS). The IIU conducted an investigation and completed a comprehensive report. The IIU report concluded, inter alia, that Madigan used excessive force during the incident described above. Consequently, Madigan was charged with various violations, a process that

culminated in his entering into a settlement agreement pursuant to which he resigned in lieu of being fired.

On September 8, 2009, Blake filed a pro se Complaint asserting a § 1983 claim based on Madigan's attack and the surrounding events. Doc. No. 1. On February 4, 2010, Ross, among others, filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Motion to Dismiss).[1] On September 9, 2012, the Court issued a Memorandum Opinion that, while granting the Motion in relation to other Defendants, denied it as to Ross. Doc. No. 32. In this Opinion, the Court rejected the contention that Ross was entitled to qualified immunity, concluding that genuine issues of material fact existed concerning whether he had unconstitutionally failed to intervene. *See id.* at 7–8.

On August 2, 2011, Ross filed a Consent Motion for Leave to Amend his Answer to the Complaint (Consent Motion to Amend Answer). Doc. No. 66. Ross's proposed amended answer asserted some new defenses, including that Ross had failed to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA). Later that month, despite having consented to Ross's amendment, Blake filed a Motion to Strike Certain of Ross's Affirmative Defenses (Motion to Strike Certain Defenses), arguing that Ross waived the right to raise them by failing to do so earlier in the proceeding. Doc. No. 74. Ross subsequently lodged an Amended Complaint via consent motion, thus mooting his Motion to Strike Certain Defenses.

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[1] Madigan was not in the case at this point. Madigan has since answered. Doc. No. 53. Madigan has not moved for summary judgment or otherwise sought to have the action dismissed.

See Doc. Nos. 78-1, 85. Ross answered the Amended Complaint. Doc. No. 84. Ross's answer restates the affirmative defense of failing to exhaust administrative remedies under the PLRA.

On October 24, 2011, Blake filed a Motion to Strike Defendant Ross's Fifth Affirmative Defense (Motion to Strike). Doc. No. 87 In this Motion, as in the Motion to Strike Certain Defenses, Blake seeks to strike Ross's PLRA defense on a waiver theory.

On January 9, 2012, Ross filed a Motion for Summary Judgment. Doc. No. 94. Ross presses two primary arguments in this Motion. The first is that Blake failed to exhaust administrative remedies. The second is that the evidence is insufficient to support Blake's § 1983 excessive force and deliberate indifference claims. Blake responded to Ross's Motion for Summary Judgment on February 2, 2012. Doc. No. 96. Ross failed to file a reply brief.

II. STANDARD OF REVIEW

Summary judgment is appropriate only "if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). The Court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). To defeat a motion for summary judgment, the nonmoving party must come forward with affidavits or similar evidence

to show that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A disputed fact presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Material disputes are those that "might affect the outcome of the suit under the governing law " *Id.*

Although the Court should believe the evidence of the nonmoving party and draw all justifiable inferences in his or her favor, the nonmoving party cannot create a genuine dispute of material fact "through mere speculation or the building of one inference upon another." *See Beal v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Further, if a party "fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may consider the fact undisputed for purposes of the motion." Fed. R. Civ. P 56(e)(2). Finally, hearsay statements or conclusory statements with no evidentiary basis cannot support or defeat a motion for summary judgment. *See Greensboro Prof'l Firefighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

III. LEGAL ANALYSIS

A. Motion to Strike

Blake moves the Court to strike Ross's PLRA defense. Blake argues that Ross waived this defense by not raising it in a timely fashion. Alternatively, Blake urges the Court to strike the defense as "insufficient," averring that the defense fails as a matter of law. As the analysis in Part III.B, *infra*, shows, this defense

does not fail as a matter of law. Therefore, the Court addresses only whether Ross waived the right to raise this defense.

Ross responds that he properly raised the PLRA defense because he did so in response to Blake's Amended Complaint. Ross also asserts that Blake has failed to show unfair surprise or prejudice.

The Court agrees with Ross. The argument that Ross failed to seasonably raise the PLRA defense is somewhat shortsighted. On August 2, 2011, Ross filed his *Consent* Motion to Amend Answer. Doc. No. 66. The Consent Motion to Amend Answer explicitly stated that Ross's proposed amended answer asserted some new defenses, *id.* ¶ 2, and included as an attachment a proposed amended answer. The proposed amended answer expressly stated that Blake's "claims are barred by failure to properly exhaust all administrative remedies as required by the [PLRA] " Doc. No. 66-1 ¶ 5.

If Blake deemed it improper to raise the PLRA defense, the appropriate course of action would have been to file a partial opposition to Ross's motion for leave to amend his answer. The record does not reflect that Blake did so. Rather, Blake waited for roughly three weeks and then filed his Motion to Strike Certain Defenses.

Blake later filed a Consent Motion to Amend his Complaint. Doc. No. 78. Although the changes the Amended Complaint makes to the Complaint are largely cosmetic, an amended pleading generally supersedes the original pleading, thereby rendering the latter inoperative. *See Young v. City of Mount Ranier*,

238 F.3d 567, 572 (4th Cir. 2001) (citations and internal quotation marks omitted). Therefore, considering that Blake amended his Complaint with at least constructive knowledge that Ross sought to assert the PLRA defense, the Amended Complaint became the operative pleading. Furthermore, the Federal Rules of Civil Procedure obligate a defendant to "state [in answers] its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A); *see also* Fed. R. Civ. P 12(b)("Every defense to a claim for relief in any pleading must be asserted in [an answer] "). Accordingly, because the Amended Complaint was the controlling pleading, the Rules required Ross to raise his PLRA defense in his answer to the Amended Complaint. For these reasons alone, Ross has timely raised his PLRA defense.

Contrary to his contentions, moreover, Blake has not shown unfair surprise or prejudice on account of Ross's assertion of the PLRA defense. Although the Court agrees that Ross could have raised the PLRA defense at a much earlier stage in the proceeding, the Parties had yet to take depositions and approximately three-and-a-half months remained for discovery when Ross first raised the PLRA defense. *See* Doc Nos. 66, 88. Furthermore, Blake does little more than to vaguely state that Ross's assertion of the defense has unfairly surprised or prejudiced him. *See, e.g.*, Doc. No. 87 ¶ 13; Doc. No. 92 at 1–2; Doc. No. 96 at 22–23. Yet, as Ross aptly notes,

> [T]he prejudice Mr. Blake now complains of is nothing more than the prejudice that always accompanies the role of [a] plaintiff faced with a timely affirmative defense asserted in response

> to a complaint. Unlike Mr. Blake's assertions, affirmative defenses are not automatically waived whenever they work prejudice against the plaintiff; such a rule would require waiver in every case.

Doc. No. 91 at 4.

None of the scant authority to which Blake cites salvages his waiver theory. The only controlling case on which Blake appears to rely is *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999). The *Brinkley* court held that "there is ample authority in this Circuit for the proposition that absent unfair surprise or prejudice to the plaintiff, a defendant's affirmative defense is not waived when it is first raised in a pre-trial dispositive motion." *Id.* Here, Blake has failed to make the requisite showing of unfair surprise or prejudice. Moreover, Ross first raised the PLRA defense in his answer to Blake's Amended Complaint, not in a dispositive motion. The other case is an unpublished opinion from the Western District of Virginia. *See Carr v. Hazelwood*, Civil Action No. 7:07cv00001, 2008 U.S. Dist. LEXIS 81753 (W.D. Va. Oct. 8, 2008). Beyond being nonbinding, *Carr* is unpersuasive because the court based its finding of waiver in no small part on the fact that the defendant first raised its PLRA defense in fairly close proximity to trial. *See Carr*, 2008 U.S. Dist. LEXIS 81753, at *12–13. In this case, by contrast, the Court has scheduled no trial and Ross first raised the PLRA defense almost one-half year before the dispositive motions deadline. *See* Doc. Nos. 66, 93. Hence Blake's authorities are unconvincing.

For the foregoing reasons, the Court denies Blake's Motion to Strike.

B. Motion for Summary Judgment

As noted, Ross mounts a twofold attack in his Motion for Summary Judgment. The Court need not, however, consider Ross's second argument; namely, whether the evidence is sufficient to support Blake's § 1983 excessive force and deliberate indifference claims. This is because Ross's first argument—that Blake failed to exhaust administrative remedies—is meritorious.

"In response to an ever-growing number of prison-condition lawsuits that were threatening to overwhelm the capacity of the federal judiciary, Congress in 1996 passed the [PLRA]." *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 676 (4th Cir. 2005). "The PLRA imposes a number of restrictions on an inmate's ability to initiate civil litigation." *Id.* One such requirement entails exhausting administrative remedies. *See id.* at 676–77. That is, "[t]he [PLRA] generally requires a prisoner plaintiff to exhaust administrative remedies before filing suit in federal court." *Thomas v. Bell*, Civil Action Nos. AW-08-2156, AW-08-3487, AW-09-1984, AW-09-2051, 2010 WL 2779308, at *3 (D. Md. July 7, 2010). "42 U.S.C. § 1997e(a) provides that '[n]o action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.'" *Id.* (alteration in original). "There is no doubt that the PLRA's exhaustion requirement is mandatory." *Anderson*, 407 F.3d at 676–77 (citing

Porter v. Nussle, 534 U.S. 516, 532 (2002)); *see also Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (suggesting that exhaustion under the PLRA is mandatory even where it portends futility).

Maryland law implements an inmate grievance process that generally consists of three levels. The first level is called the Administrative Remedy Procedure (ARP). The ARP "is a formal way to resolve complaints or problems that an inmate has been unable to resolve informally." Md. Div. of Corr., Inmate Handbook 30 (2007), http://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf. Usually, the ARP process involves filing a request for administrative remedy with the warden of the institution in which the inmate is incarcerated. *See id.*; *Chase v. Peay*, 286 F Supp.2d 523, 529 n.10 (D. Md. 2003). The second step, for its part, entails appealing the warden's decision to the Commissioner of Correction (Commissioner). *See id.*; *Chase*, 286 F Supp.2d at 529 n.10. The third, and final, step occasions appealing the Commissioner's decision to the Inmate Grievance Office (IGO). *See id.*; *Chase*, 286 F Supp.2d at 529 n.10.

This is not to imply, however, that instituting a grievance with the IGO invariably depends on satisfaction of the first two steps. Quite the contrary, Maryland law permits prisoners in the custody of the Division of Correction (DOC) to file a grievance directly with the IGO. *See* Md. Code Ann., Corr. Servs. § 10-206(a). This authorization comes with two central caveats. First, grievants must submit their complaints "within the time and in the manner required by regulations adopted by the Office." *Id.* Second, the IGO

may, by regulation, require prisoners to exhaust DOC grievance procedures where the procedures are (1) applicable to the grievance and (2) "reasonable and fair." *Id.* § 10-206(b). Pursuantly, the IGO has issued a regulation requiring grievants to "properly exhaust the [ARP]" "if the [ARP] applies to a particular situation or occurrence." Md. Code Regs. 12.07.01.02D. In short, notwithstanding their interrelation, the IGO grievance procedure is at once legally and practically distinct from the ARP process.

In this case, Blake concedes that he failed to abide by both the ARP and IGO grievance processes. The PLRA thus dictates that the Court dismiss this action. In an attempt to avert dismissal, Blake maintains that the IIU's conduct of an investigation exempted him from complying with the ARP and IGO grievance processes.

Although Blake's argument is partially correct, it ultimately fails. True, the ARP process does not apply to complaints with "the same basis [as] an investigation under the authority of the (IIU)." DCD 185-003.VI.N.4. In other words, if the IIU is investigating an incident with the same factual underpinning as a prisoner's complaint, the prisoner may not submit the complaint to the ARP process, including appeals to the Commissioner. *See id.*, *see also Davis v. Rouse et al.*,1:08-cv-03106-WDQ, Doc. No. 23-1, Ex. B-1 (Commissioner's dismissal of an appeal of a warden's dismissal of a complaint in light of an IIU investigation).

The DOC's directives do not, however, spare prisoners from satisfying the IGO grievance process. On the contrary, the DOC's 2007 Inmate Handbook

provides that "[t]he IGO reviews grievances and complaints of inmates after the inmate has exhausted institutional complaint procedures, such as the [ARP]." Md. Div. of Corr., Inmate Handbook 30 (2007), http://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf.; *cf.* DCD 185-003.VI.N.7 ("A final dismissal for procedural reasons shall be treated as a substantive decision and the rationale for dismissal may be appealed by the inmate.")

Nor could the DOC's directives excuse prisoners from exhausting the IGO grievance process in this case's circumstances. As outlined above, Maryland law vests primary responsibility of fielding inmate grievances with the IGO. The IGO, in turn, has issued a regulation requiring grievants to properly exhaust the ARP only if the ARP applies to a particular situation or occurrence. *See* Md. Code Regs. 12.07.01.02D. Here, in view of DCD 185-003.VI.N.4, the ARP does not apply to Blake's complaint. As a result, the IGO grievance process applies to Blake's complaint. Blake concedes that he failed to exhaust these procedures, and this concession is fatal to his cause.

Blake asserts that, on account of the IIU's investigation, Blake "had nothing to appeal, thus he did not have any 'grievance' that he could have pursed with the IGO." Doc. No. 87 at 7. This argument is an attempt to obfuscate clear statutory and regulatory mandates. To reiterate, Maryland law permits prisoners in DOC custody to file a grievance directly with the IGO, and the ARP does not apply to Blake's complaint. *See* Md. Code Ann., Corr. Servs. § 10-206(a); Md. Code Regs. 12.07.01.02D; *see also* Md. Code Regs.

12.07.01.05A (providing that prisoners must file grievances with the IGO within 30 days of the date on which the underlying incident occurred "[e]xcept as otherwise provided in this chapter"). In fact, the applicable regulations expressly contemplate the contemporaneous conduct of IIU and IGO proceedings based on the same underlying events. *See* Md. Code Regs. 12.11.01.05B. As the DOC's 2007 Inmate Handbook aptly states, "[t]he IGO reviews grievances and complaints of inmates after the inmate has exhausted institutional complaint procedures, such as the [ARP]." Md. Div. of Corr., Inmate Handbook 30 (2007), http://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf. Judged against these authorities, Blake's insistence that he had no appealable grievance is, at best, blithe.

Blake cites this Court's decision in *Thomas* for the proposition that the IIU's realization of an internal investigation excuses prisoners from their requirement to exhaust administrative remedies as an antecedent to instituting prison-condition lawsuits. *See Thomas*, 2010 WL 2779308, at *4. To support his reliance on *Thomas*, Blake notes that at least one other court in the District of Maryland has reached the same conclusion. *See Bogues v. McAlpine*, Civil Action No. CCB–11–463, 2011 WL 5974634, at *4 (D. Md. Nov. 28, 2011); *see also Williams v. Shearin*, Civil No. L–10–1479, 2010 WL 5137820, at * 2 n.2 (D. Md. Dec. 10, 2010) (holding that an inmate's failure to file an ARP complaint did not defeat his ability to proceed in federal court, partly because of the convocation of an internal investigation).

These cases are unconvincing. The *Thomas* and *Bogues* courts came to the conclusion that the

commencement of an internal investigation precluded dismissal on failure to exhaust grounds in view of DCD 185-003.VI.N.4. As spelled out above, however, DCD 185-003.VI.N.4 provides only that prisoners may not use the ARP process when the events underlying their complaint are the subject of an IIU investigation; DCD 185-003.VI.N.4 has nothing to do with the IGO grievance process. In retrospect, *Thomas*—as well as *Bogues*—may have inadequately addressed this aspect of the pertinent statutes, regulations, and directives. For its part, *Williams* does not cite any authority in reaching the conclusion that the commencement of an internal investigation precludes dismissal for the failure to exhaust.

Nor does the realization of an internal investigation relieve prisoners from the PLRA's exhaustion requirement as a matter of general statutory construction. Although the Fourth Circuit has yet to address whether the implementation of an internal investigation excuses prisoners from exhausting administrative remedies, the Sixth, Seventh, and Ninth Circuits have addressed this very question. *See Pavey v. Conley*, 663 F.3d 899, 905–06 (7th Cir. 2011); *Panaro v. City of North Las Vegas*, 432 F.3d 949, 953–54 (9th Cir. 2005); *Thomas v. Woolum*, 337 F.3d 720, 734 (6th Cir. 2003). Each of these Circuits has held that an internal investigation does not relieve prisoners of the PLRA's exhaustion requirement. *See id.* These holdings are based on "the literal command of the PLRA, which precludes an action by a prisoner 'until such available administrative remedies as are available are exhausted.'" *Panaro*, 432 F.3d at 953 (quoting 42 U.S.C. § 1997e(a)). In other words, "Section 1997e(a) is concerned with the 'remedies' that have been made

available to prisoners." *Pavey*, 663 F.3d at 905. "An internal-affairs investigation may lead to disciplinary proceedings targeting the wayward employee but ordinarily does not offer a remedy to the prisoner who was on the receiving end of the employee's malfeasance." *Id.* (citations omitted). Furthermore, "even if the internal-affairs investigation could result in some relief for the prisoner, the Supreme Court has rejected any suggestion that prisoners are permitted to pick and choose how to present their concerns to prison officials." *Id.* at 905–06 (citing *Woodford v. Ngo*, 548 U.S. 81, 95 (2006)).

The preceding discussion demonstrates that Blake has failed to exhaust administrative remedies in accordance with the PLRA. Consequently, the Court dismisses and closes this action.

IV CONCLUSION

For the foregoing reasons, the Court **DENIES** Blake's Motion to Strike and **GRANTS** Ross's Motion for Summary Judgment. A separate Order follows.

May 10, 2012
Date

/s/ _____
Alexander Williams, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. 8:09-cv-02367-AW

[Filed May 10, 2012]

SHAIDON BLAKE,
Plaintiff,

v.

GARY MAYNARD *et al.*,
Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, IT IS this **10th day of May, 2012**, by the U.S. District Court for the District of Maryland, hereby **ORDERED**:

1. That Plaintiff's Motion to Strike is **DENIED** (Doc. No. 87);

2. That Defendant Ross's Motion for Summary Judgment is **GRANTED** (Doc. No. 94);

3. That the Clerk **CLOSE** the case; and

4. That the Clerk transmit a copy of this Order to all counsel of record.

May 10, 2012
Date

/s/ Alexander Williams, Jr.
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-7279
(8:09-cv-02367-AW)

[Filed June 16, 2015]

SHAIDON BLAKE,
Plaintiff - Appellant

v.

MICHAEL ROSS, Lt.
Defendant - Appellee

and

THE DEPARTMENT OF CORRECTIONS; STATE OF MARYLAND; M.R.D.C.C.; GARY MAYNARD, Sec.; MICHAEL STOUFFER, Comm., JAMES MADIGAN
Defendants

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G

ECF Document 94-3

[Filed January 9, 2012]

Shaidon Blake vs Gary Maynard, et al.

Shaidon Blake
September 27, 2011

[p.42]

nurse?
A Captain Vincent.
Q Why did you see Captain Vincent?
A He was the guy that responded first and came in asking me questions.
Q Did he ask you questions about the incident?
A Yes.
Q Did you write a statement?
A Not with Captain Vincent, I didn't.
Q Did you write a statement at any time?
A Yes.
Q When did you write the statement?
A That was about 20 or 30 minutes after I was put in my cell for segregation.
Q Had you spoken to anybody before you wrote the statement?
A Briefly with Lieutenant Joyner down in the holding cell.
Q Would you say that the statement that you wrote then was accurate?

[p.43]

A It was accurate, yes.
Q When did Captain Vincent come to talk to you?
A Captain Vincent came up at about maybe 15, 20, 30 minutes afterwards.
Q Do you remember what he asked you about?
A He asked me about the incident that occurred.
Q Did anyone come to talk to you about the incident after Captain Vincent?
A Captain Cruz.
Q Who is Captain Cruz?
A That's who assigned me to administrative segregation. He came in to bring the paperwork for it.
Q Were you told why you were assigned to administrative segregation?
A Yes.
Q Why?
A Pending an investigation in the assault.
Q Did anybody else come to talk to you?
A Yes.

[p.44]

Q Who else?
A Intel.
Q Did you speak with the investigator?
A Briefly.
Q Do you remember what you spoke about?
A The incident.
Q What did you tell them about the incident?
A The same thing I wrote in the report.
Q At that time, did you ask that the investigation be closed?
A No.

Q Did you ever ask that the investigation be closed?
A I didn't ask anything.
Q Did you sign a statement asking that the investigation be closed?
A I didn't sign anything asking for the investigation to be closed.
MS. RICE: Mark that.
(Mr. Blake Deposition Exhibit 1 was marked for purposes of identification.)

[p.45]

Q Do you recognize this document?
A It's got my signature on it.
Q Do you remember signing it?
A Vaguely, yes.
Q Do you remember why you signed the document?
A Because I was told that there was an investigation going on, that it was being handled, so I said okay.
Q Did you read the document before you signed it?
A I was in handcuffs. This wasn't in MRDCC. This was months later and I was in handcuffs.
Q So, when you said that Intel came to visit you, was that at MRDCC?
A Yes.
Q When did Intel come to visit you?
A Maybe three days to a week after the incident.
Q Where were you when you signed this document?

[p.46]

A Cumberland, Maryland, North Branch Correctional Institute.
Q Had an investigator come to visit you again?
A No.
Q Who asked you to sign the document?

A A dude from outside the investigation talked to me or something and it was over the phone.
Q Do you know whose signature this is on the witness line?
A Lieutenant Thomas, North Branch Correctional Institute.
Q Are there two different signatures here?
A The top guy was who I spoke to over the phone. This is a fax.
Q You spoke to him over the phone. What did he say to you?
A He said it's being investigated. He couldn't inform me what's going on, but it's being investigated.
Q What did he tell you the purpose of this

[p.47]

form was?
A He just said he needed the form. Lieutenant Thomas asked me to sign the form.
Q Did you read the form?
A I guess I did. I don't recall.
Q Have you read the form now?
A Yes, I have.
Q What does the form say?
A It says "I, Shaidon Blake, 343938 have been involved in an incident that was reported to the Department of Public Safety and Correctional Services Internal Investigative Unit. I am now requesting that no investigation be conducted. By signing this statement, I am requesting that no further investigative action be taken on this complaint and that the matter be considered CLOSED. This statement is being signed freely and

voluntarily with no threat or coercion being used against me to sign this statement."

Q So, you said your understanding was that the investigation would continue after you signed this

[p.48]

form?

A Yes.

Q Do you know what the outcome of the investigation was?

A The guy said internal investigation. He can't inform me.

Q Was there a request for administrative remedy?

A Was there a request for? I don't understand what you mean.

Q Do you know what a request for administrative remedy is?

A I don't want to assume we're talking about the same thing.

Q Within the Department of Correction, what does that term mean?

A Are you speaking about grievances?

Q Well, an ARP What is an ARP?

A ARP, you send that to the warden or whatever and the warden will take care of something for you.

[p.49]

Q Did you file an ARP about this incident?

A No, the warden did. The warden instantly jumped in and involved himself.

Q But, you didn't file an ARP about this incident?

A No. It was dealt with internally. The ARP is if you want to get their attention, to get them to react to your situation.

Q Have you ever filed an ARP?
A No.
Q Did you file any grievance about this incident?
A It's the same thing.
Q With the Inmate Grievance Office?
A No.
Q Why not?
A Because it was handled. The warden instantly got an investigation going. That's what it's for.
Q Have you ever read the Division of Correction directives about the administrative remedy

[p.50]

procedure?
A No.
Q What about the Inmate Grievance Office, directives about the inmate grievance procedure?
A No.
Q Since June 21st, 2007, have you fallen?
A Have I fallen? No, I cannot remember.
Q Did you fall out of your bunk?
A When?
Q In September.
A I don't remember.
Q 2007?
A I don't remember.
Q Since the incident, have you been assaulted?
A Yes.
Q When were you assaulted?
A I don't remember.
Q What happened?
A It was nothing. Just two blows and that's it. It was a fight.

[p.51]

Q Where were the blows?
A My shoulder right here (indicating).
Q Your shoulder and your neck?
A It was the shoulder and back of my neck.
Q Was there a weapon used?
A A tiny piece of a clothes hanger.
Q Did you suffer any injuries from the incident?
A No.
Q You mentioned earlier that you're suffering from post-traumatic stress disorder; is that correct?
A Yes.
Q What are your symptoms?
A Well, I'm on the segregation unit. They come through like using keys and jingling the locks, like slightly coming in my cell or something. My sleep is kind of crazy, you know, dealing with the situation over and over and over again it seems like. I don't interact too good with the officers, not like arguing or whatever, but just don't want to be bothered. I can't wear restraints. I'm on the segregation unit. I

[p.52]

just can't wear restraints, because I don't feel safe like that any more.
Q You said that you're reliving the situation over and over and over. What situation do you mean?
A Being beat up, having them just jump on me like that and not being able to even like defend myself or anything.
Q Before you were incarcerated in Maryland, had you ever been assaulted before?
A No. I wouldn't consider it assaulted, no.
Q What would you consider being assaulted?

A Is mutual combat an assault? I wouldn't say that mutual combat was an assault. I've never been assaulted without being able to defend myself.
Q So, were you in fights before?
A Sure.
Q Frequently?
A No.
Q How often?
A When I was a kid, part of growing up, you know, normal.

[p.53]

Q Were you ever injured in a fight?
A No.
Q Do any other situations ever bother you?
A That's kind of vague. What are you speaking of?
Q Do you ever think about things that happened to you in the past over and over and over again other than this incident?
A Well, I always think about things over, but not traumatic. I mean, nothing, I guess really like causing me harm.
Q Talking about what you described as this situation bothering you over and over and over again, when does that generally happen? What time of day?
A There is no specific time of day. Okay. It's not just bad dreams. It's not just that. It's just all day, because really the situation I'm in, I have to interact and be around these people all day. I just so happen to be back in the same building.
Q You told me earlier that your back here because of your post-conviction hearing.

APPENDIX H

ECF Document 94-4

[Filed January 9, 2012]

NORTH BRANCH CORRECTIONAL INSTITUTION

Inmate Orientation Handbook Receipt

On today's date I attended Orientation at the North Branch Correctional Institution, conducted by NBCI staff. I have been given the opportunity to ask any relevant questions. I understand it is my responsibility to familiarize myself with the information contained in the Handbook. As part of the orientation, I received oral communication of information on access to health care, emergency evacuation, and the system for processing complaints regarding institutional matters. Furthermore, I understand the Handbook is not a policy document, but rather a collection of information taken from Division of Correction Directives (DCD's) and Institutional Directives (ID's) of the North Branch Correctional Institution. The material is provided for my information, and should I wish to further research any topic I may refer to the appropriate directive.

Inmate's Signature: /s/ Shaidon Blake DOC#343938

NBCI Staff Signature: /s/_____

Date: 7-13-07 Handwritten: Shidon Blake 343938

Division of Corrections
Md. Reception Diagnostic and Classification Center
Intake Orientation Receipt

I acknowledge receipt of Inmate Orientation via Video at MRDCC. The following items were reviewed:

1. Division of Corrections Policies.
2. Classification Process.
3. Program Eligibility Requirements.
4. Rules, Regulations, and Disciplinary Procedures.

Shaidon Blake 343938
Inmate's Name (Print) I.D. Number

/s/
Inmate's Signature

[Illegible]
Date

****

Inmate refused Intake Orientation via Video and refused to sign receipt.

_____
Employee's Signature/Title

_____
Date

MARYLAND DIVISION OF CORRECTION

INMATE'S RECEIPT OF DIVISION OF CORRECTION INMATE HANDBOOK

Today I received a copy of the Division of Correction Inmate Handbook. I understand that I must keep this handbook, know its contents, and comply with its provisions.

/s/ Shaidon Blake
Inmate's Signature

343938
DOC Number

5-31-07
Date

I personally gave the above-named inmate a copy of the Division of Correction Inmate Handbook, but the inmate refused to sign an acknowledgement of receipt.

_____
Employee's Signature

_____
Date

APPENDIX I

ECF Document 94-10

[Filed January 9, 2012]

* * *

[pp.30-31]

2. The courts will give an inmate a lawyer when he/she makes a direct appeal to the Maryland Court of Appeals or Court of Special Appeals.

3. The U.S. District Court will give an inmate a lawyer when the court decides it is necessary.

If an inmate wishes to file a federal civil rights complaint, the inmate should ask his/her case management specialist for copies of the forms and instructions.

J. Administrative Remedy Procedure (ARP)

The Administrative Remedy Procedure (ARP) is a formal way to resolve complaints or problems that an inmate has been unable to resolve informally. Inmates may use the ARP for all types of complaints except the following:

1. case management recommendations and decisions
2. Maryland Parole Commission procedures and decisions
3. disciplinary hearing procedures and decisions
4. appeals of decisions to withhold mail

Full descriptions of the requirements of the ARP are in the library. Each institution has an Administrative Remedy Coordinator (ARC). The ARC is there to help inmates in getting forms, filling out the forms, and providing general guidance. An inmate's case management specialist may also answer questions about ARP

Inmates should try to resolve problems informally by contacting the staff who can help verbally or submit an informal complaint form. When this does not work, an inmate may submit a formal "Request for Administrative Remedy" form to the warden that inmates can get from their case management specialists, housing unit officers or the library. Inmates must pay attention to the directions and filing deadlines on the forms.

The ARP has rights of appeal. An inmate may appeal the warden's response to the Commissioner. Then he/she may appeal the Commissioner's response to the Inmate Grievance Office (IGO) within 30 calendar days from the inmate's receipt of the Commissioner's response. The IGO will not accept complaints that can be handled through ARP, unless an inmate has already filed an ARP with the warden and appealed to the Commissioner. The next level of appeal after the IGO is the court.

K. Inmate Grievance Office (IGO)

The IGO reviews grievances and complaints of inmates against the Division of Correction or Patuxent Institution after the inmate has exhausted institutional complaint procedures, such as the Administrative Remedy Procedure. The IGO conducts

a preliminary review of each complaint. Complaints received late or wholly lacking in merit are administratively dismissed without a hearing. Such dismissal is a final decision. Complaints that are not administratively dismissed are accepted and a grievance hearing date is set. Grievances are heard before an administrative law judge from the Office of Administrative Hearings, which is a state agency that makes decisions on grievances. The administrative law judge has the authority to issue subpoenas and administer oaths.

Hearings are held at the institution and may be conducted in person or via video conferencing equipment. An inmate may, at his/her cost, have a lawyer at the hearing; or the inmate may have another inmate represent him/her. The Division does not have to transport inmates from one prison to another to represent an inmate. An employee selected by the warden will represent the agency. Witnesses may be examined or cross-examined, under oath, by the inmate or his/her representative. The hearing will be tape-recorded. The IGO and law judge have the right to review official records relating to a complaint and to subpoena evidence or witnesses. They may also examine and copy any documentary evidence, and have access to any person or institution being investigated or proceeded against.

The administrative law judge will issue a written Order which will find the case meritorious, meritorious in part, or dismissed. If the decision of the administrative law judge is that the grievance is

dismissed, the Order is sent directly to the inmate by the Office of Administrative Hearings and is a final decision.

A final decision may be appealed to the circuit court of the county where the inmate is confined. It must be filed within 30 days of the date of the final decision.

Meritorious decisions and meritorious in part decisions are sent to the Secretary of Public Safety and Correctional Services. Within 15 days the Secretary affirms, reverses, or modifies the judge's Order, and directs the Order to be carried out. The Secretary's Order is a final decision.

Filing an IGO Complaint

A complaint must be filed within 30 days of the date on which the Division's procedures have been exhausted, i.e., 30 days from the date of the disciplinary decision, case management decision, or ARP decision; or 30 days from the date the decision was due. The time limitation may be waived for a grievance that is a continuing problem. The grievance should include the following:

1. inmate's commitment name and number
2. date of correspondence
3. problem
4. person(s) involved
5. facts and evidence the inmate has about important details (give dates, times, and names of any person(s) involved, if known)
6. names and addresses of any witnesses the inmate has and the nature of their expected testimony
7 name and address of the person the inmate would like to appear at a hearing as his/her representative

8. ARP appeals with copies of the inmate's ARP complaints to the warden and the Commissioner, along with their responses, if any.

Mail it in a sealed envelope to:

Executive Director
Inmate Grievance Office
115 Sudbrook Lane – Suite 200
Baltimore, MD 21208

NOV 2 - 2015

No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Shaidon Blake was beaten by two prison guards: petitioner Michael Ross and his colleague James Madigan. That same day, Blake lodged a complaint that triggered a year-long investigation by Maryland's Internal Investigative Unit, the entity responsible for investigating claims that prison guards used excessive force. The investigation confirmed Blake's claim that the guards beat him. In lieu of termination, Madigan resigned. Blake subsequently won a $50,000 jury verdict against Madigan.

The district court dismissed Blake's claims against Ross on the basis of the PLRA exhaustion requirement. The court of appeals reversed and remanded for further proceedings. The following questions are presented:

(1) Whether petitioner, who failed to raise the exhaustion defense until nearly two years after the filing of this suit, waived the defense.

(2) Whether respondent complied with Maryland's administrative remedy scheme by triggering an investigation by the state entity that has express jurisdiction over claims of excessive force.

(3) Whether, if respondent did not comply with the technical requirements of Maryland's administrative scheme, he nonetheless satisfied the PLRA exhaustion requirement by reporting the incident in a manner that an objectively reasonable observer would have believed satisfied his state law obligations and that caused an investigation that fulfilled the substantive purposes of PLRA exhaustion.

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BRIEF IN OPPOSITION

STATEMENT

This case is a clear example of a meritorious prisoner lawsuit. Respondent Shaidon Blake was restrained and beaten by prison guards. That is not a mere allegation: the prison conducted a year-long investigation, and the warden himself ultimately found that the use of force was "excessive." Maryland thus brought formal charges against one of the prison guards, Madigan, who resigned in lieu of being fired. Once armed with a thorough administrative record substantiating his claims, respondent filed this suit. The clarity of the record led the district court to appoint private counsel. Ultimately, a jury returned a $50,000 verdict against Madigan.

There can be no dispute: this is the kind of meritorious prisoner lawsuit that *should* be brought.

Petitioner Michael Ross, the other prison guard involved in the incident, sought to avoid suit by claiming that respondent failed to exhaust his administrative remedies. The court of appeals properly rejected his contention. Certiorari should be denied.

To begin with, this case requires the Court to confront two issues before it can reach the question presented by petitioner. *First*, petitioner waived his exhaustion defense by failing to assert it in his answer or his initial dispositive motion. It was far too late when petitioner first asserted the defense nearly two years after respondent filed suit. This question does not warrant the Court's review.

Second, petitioner's question assumes, wrongly, that respondent did not properly comply with the

technical requirements of Maryland's administrative remedy scheme. In fact, respondent did precisely what Maryland law instructed him to do. Such a narrow question of state law does not warrant this Court's attention, all the more so because Maryland has since amended its law to resolve any prior confusion.

Even as framed by petitioner, the question presented does not warrant further review. The facts of this case are unusual, and the holding below is narrow. There is, moreover, no conflict in the lower courts—petitioner has not identified a single decision from a court of appeals that has confronted the same limited factors the court here found controlling. Nor can petitioner demonstrate that the decision here has any prospective significance. Since the decision below issued, scores of district courts in the Fourth Circuit have dismissed prisoner complaints for run-of-the-mill failures to exhaust; petitioner, by contrast, does not point to even one case that he believes, but for the decision here, should have been decided differently. Finally, the decision below is correct. If respondent did not in fact comply with the technicalities of Maryland state law, his objectively reasonable belief that he had done so, coupled with an internal prison investigation that satisfied the substantive purposes of administrative exhaustion, render respondent in compliance with the PLRA exhaustion obligation.

A. Factual background.

Respondent is an inmate at the Maryland Reception and Classification Center. Pet. App. 3. Petitioner, Michael Ross, is a guard at the facility. *Ibid.*

On June 21, 2007, petitioner and another guard, James Madigan, set out to move Blake to a different cell block. Pet. App. 3. Petitioner handcuffed Blake's hands behind his back (*ibid.*); Blake did not resist (*id.* at 47). While they were walking down concrete stairs, Madigan shoved Blake from behind, forcing Blake to push his elbows against the railing to avoid falling down the concrete stairs. *Id.* at 3. At the bottom of the stairs, Madigan shoved Blake again. *Id.* at 4. Blake cursed at Madigan following the second shove. *Ibid.*

Petitioner subsequently held Blake against a wall while Madigan "wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession." Pet. App. 4. Petitioner did nothing to intervene and, after a brief pause, Madigan punched Blake again while petitioner continued to hold him. *Ibid.* Petitioner and Madigan then lifted Blake from the ground and dropped him, slamming his head. *Id.* at 48. Petitioner "dropped his knee onto Blake's chest." *Id.* at 4.

Other guards subsequently took Blake to the medical unit. Pet. App. 4. Blake was later diagnosed with nerve damage. *Ibid.* He continues to suffer from persistent headaches, for which he is treated with Neurontin, a nerve pain medication. JA73-74.

B. Respondent's administrative grievance.

1. The Maryland Department of Public Safety and Correctional Services (the "Department") "provides inmates with a number of administrative avenues for addressing complaints and problems." Pet. App. 7 The "Administrative Remedy Procedure" ("ARP") permits a broad range of complaints. Pet. App. 7-8. This process has three steps: an inmate

may request a remedy from the prison warden, if denied, he may appeal to the Commissioner of Corrections, and, finally, he may further appeal to the Inmate Grievance Office. *Id.* at 8.

Additionally and separately, the Department administers the Internal Investigative Unit ("IIU"). Pet. App. 8. The IIU has mandatory jurisdiction over claims that a prison guard used "excessive force." Md. Code Regs. § 12.11.01.05(A)(3). The IIU is a well-established administrative scheme within the Department, governed by extensive regulations. See *Id.* § 12.11.01.00 to .12. IIU investigators are required to, among other things:

> (1) Conduct an investigation in an impartial and reasonable manner according to the oath of office and law of the United States and the State.
>
> * * *
>
> (3) Ensure the safety and chain of custody for items and evidence received;
>
> (4) Maintain confidentiality of all matters related to investigations; and
>
> (5) Prepare an investigative report that, at a minimum, contains: (a) Complete and detailed information regarding the complaint or incident; (b) A clear account of investigative actions; and (c) All relative information supporting the finding.

Id. § .07(C).

To fulfill these obligations, IIU investigators have extensive powers. They may:

> (1) Access Department records; (2) Request assistance from an agency employee; (3) Request assistance from another law enforcement agency; (4) Inspect facilities, vehicles, or equipment; and (5) Require an employee to provide testimonial or physical evidence.

Id. § .07(B).

The court of appeals described the intersection between these two administrative remedies—the ARP and the IIU—as "murky." Pet. App. 15. Reviewing the relevant regulations, directive, and handbook in effect at the time of the assault, the court of appeals found that "there is no basis for an inmate to conclude that the ARP and IIU processes would be permitted to proceed concurrently." *Id.* at 12. And, as the lower court noted, "at least three district court judges have found that an internal investigation removes an inmate's complaint from the ARP process." *Id.* at 14-15 n.8 (citing cases).

Following the incident at issue, the Department amended directive DCD 185-003, which now provides that "an ARP complaint will be dismissed for procedural reasons 'when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit (IIU).'" Pet. App. 13 & n.5. See also JA437.

2. On June 21, 2007, the day petitioner and Madigan assaulted him, respondent lodged a complaint that triggered an investigation by the IIU. Pet. App. 4. A year-long inquiry ensued (*id.* at 4-5), resulting in an extensive administrative record complete with multiple witness statements and factual findings by the IIU. JA27-67. Petitioner provided a

written statement. Pet. App. 11. So did the respondent, who was interviewed by an internal affairs investigator. *Id.* at 66-68.

The report concluded that "Madigan had used excessive force against Blake by striking him in the face while he was handcuffed." Pet. App. 4-5. In particular, the Security Chief confirmed, in a signed, handwritten note stated that "[t]he amount of force used was not in compliance with the * * * use of force manual." JA56. The prison warden likewise confirmed, in a signed, handwritten note, that "[u]se of force was unnecessary [and] therefore it was excessive." *Ibid.*

As a result of the investigation, the State charged Madigan with "engaging in intentional misconduct, without justification, that seriously threatens the safety of the workplace; wantonly careless conduct in the care and custody of an inmate and excessive use of force which could reasonably be expected to result in serious bodily harm or death." JA385. Madigan entered into "a settlement agreement pursuant to which he resigned in lieu of being fired." Pet. App. 32.

By contrast, the "report did not assign any fault to [respondent]." Pet. App. 5. It therefore "did not recommend any disciplinary action against him." *Ibid.* Respondent, according to the prison's report, was an innocent victim in this incident.

C. Proceedings below.

1. In September 2009, respondent, acting *pro se*, filed this Section 1983 suit against petitioner and Madigan, contending that their excessive use of force violated his constitutionally-protected rights. Pet. App. 5. Petitioner answered the complaint in Nov-

ember 2009, and then filed a motion requesting dismissal or summary judgment in February 2010. *Ibid.* Petitioner did not assert an exhaustion defense at either time. *Ibid.* After denying petitioner's motion, the district court appointed counsel to represent respondent. *Ibid.*

In August 2011, nearly two years after respondent filed suit, petitioner requested consent to file an amended answer. Pet. App. 5. Acknowledging that they intended to amend respondent's handwritten, *pro se* complaint, respondent's court-appointed counsel agreed that an amended answer would be appropriate. *Ibid.* The parties did not discuss the specific aspects of the amendment. *Ibid.*

Petitioner's amended answer asserted, for the first time, an affirmative defense that respondent had failed to adequately exhaust his administrative remedies. *Id.* at 5-6. The district court granted petitioner's consent motion less than a day after it was filed. *Id.* at 6. And, after respondent filed an amended complaint, petitioner filed another answer, again asserting an exhaustion defense. *Ibid.*

Respondent immediately moved to strike petitioner's exhaustion defense from both answers, arguing that it was waived. Pet. App. 6. Petitioner, in contrast, moved for summary judgment on the ground that respondent had failed to adequately exhaust administrative remedies. *Ibid.*

The district court denied respondent's motion to strike, and it granted petitioner's motion for summary judgment. Pet. App. 46-61.

As to waiver, the district court reasoned that respondent should have objected—in the less than 24-hour window—between when petitioner filed his mo-

tion to amend and when the court granted it. Pet. App. 52. Additionally, the court found that, because respondent filed an amended complaint, petitioner was entitled to amend his complaint to add new defenses. *Id.* at 52-53.

As to the question of exhaustion, the court found "that an internal investigation does not relieve prisoners of the PLRA's exhaustion requirement." Pet. App. 60. Thus, the court found that respondent's failure to engage in the ARP process meant he failed to exhaust available administrative remedies. *Id.* at 40-42. The court entered judgment in petitioner's favor. *Id.* at 6.

The case proceeded to a jury trial as to Madigan. The jury concluded that respondent proved, by a preponderance of the evidence, that "Madigan maliciously and sadistically committed an act that violated Plaintiff Shaidon Blake's federal constitutional right not to be subjected to excessive force." JA568. The jury awarded respondent $50,000 in damages. *Ibid.* The district court subsequently denied Madigan's request for a new trial (JA576-579), entered judgment in respondent's favor (JA580), and awarded respondent attorneys' fees (JA572-576).

Madigan did not appeal. Respondent appealed the district court's entry of judgment as to petitioner.

2. The court of appeals reversed. Pet. App. 1-28. Finding petitioner's exhaustion defense "without merit," the court did not address the question of waiver. *Id.* at 6. Nor did the court of appeals determine whether respondent did in fact satisfy Maryland's remedial scheme. *Id.* at 12-13 & n.6.

Instead, the court reasoned that, even assuming petitioner had not satisfied a technical requirement

of Maryland state law, he nonetheless qualified as having exhausted administrative remedies in the narrow confines of this case. Pet. App. 11-15. This required two showings: (1) that respondent had "an objectively reasonable belief that he had exhausted all available avenues for relief" (*id.* at 12 & n.4), and (2) that respondent's actions caused an investigation by the prison that "exhausted his remedies *in a substantive sense* by affording corrections officials time and opportunity to address complaints internally" (*id.* at 10 (quotations omitted)).

The court concluded that the facts of this case satisfy both requirements. As to the first, the court found that respondent "reasonably interpreted Maryland's murky inmate grievance procedures," particularly insofar as "the grievance system is confusing enough that at least two learned judges" have interpreted state law like respondent. Pet. App. 15 & n.8. As to the second, "[t]he Department conducted a one-year investigation into [respondent's] violent encounter with Madigan and [petitioner], at the conclusion of which it issued Madigan an Unsatisfactory Report of Service and relieved him of his duties as a corrections officer." *Id.* at 11.

Judge Agee dissented. Pet. App. 16-28. In his view, notwithstanding the IIU complaint, respondent failed to exhaust administrative remedies. *Id.* at 20. He additionally suggested, but without actually concluding, that "[t]he PLRA's exhaustion requirement may not even be amenable to any exceptions." *Id.* at 21. Judge Agee mainly quarreled with whether, in light of the facts of this case, it was objectively reasonable for respondent to believe that he complied with state law requirements. *Id.* at 22-27 His principal conclusion, therefore, was that "a reasonable

interpretation exception does not excuse [respondent's] failure to exhaust" in the facts of this case. *Id.* at 27.

The court of appeals denied petitioner's request for rehearing *en banc* without calling for a response. Pet. App. 64. No member of the court of appeals requested a poll. *Ibid.*

REASONS FOR DENYING THE PETITION

This Court's intervention is unwarranted. Before the Court can reach the issue presented by petitioner, there are two prior questions—whether petitioner waived the exhaustion defense and whether respondent complied with the technical requirements of Maryland state law. Neither issue merits review. And the reasons offered by petitioner in support of certiorari each fail: there is no conflict in the circuits; petitioner fails to demonstrate that the narrow holding below has any prospective significance; and the lower court's decision is correct.

A. This case is not an appropriate vehicle to review the question framed by petitioner.

To begin with, there are two, independent grounds, apart from the issue pressed by petitioner, on which respondent wins this case. Because both issues are logically prior to the question framed by petitioner, and because neither warrants review, certiorari should be denied.

1. Petitioner waived the exhaustion defense.

Petitioner waived the defense by failing to include it in his initial answer and dispositive pleading. Petitioner first asserted the exhaustion defense,

by way of an amended answer, nearly two years after respondent filed suit. Pet. App. 5.

It is established that "failure to exhaust is an affirmative defense under the PLRA." *Jones* v. *Bock*, 549 U.S. 199, 216 (2007). And, moreover, "[i]t is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case." 5 Charles Alan Wright et al., Federal Practice & Procedure § 1278 (3d ed. 2004).

The court of appeals did "not reach the issue of whether [petitioner] waived the defense." Pet. App. 6. But, because this is a threshold question to the issue for which petitioner seeks review, that issue would be squarely put to this Court. And there is substantial reason to conclude that the Court would, on the facts of this case, find waiver.

To be sure, the dissenting judge below would have found the exhaustion defense not waived because respondent's counsel consented to petitioner's request to file an amended answer. Pet. App. 27-28. See also Pet. App. 52. But that is incorrect.

Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend his answer (once the time for amending by matter of right has elapsed) only by "the opposing party's written consent or the court's leave." The scope of that consent is measured against an objective reasonableness standard. *Cf. Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness.").

Below, counsel for respondent agreed that petitioner may file an amended answer *because* respondent intended to amend the complaint (to replace respondent's handwritten, *pro se* complaint). JA90. But respondent's counsel never consented to petitioner's assertion of a wholly new defense. Pet. App. 5.

It would be unreasonable to conclude that respondent's consent extended so far: courts have broadly held that "a defendant cannot plead new counterclaims or affirmative defenses as of right unless the amended complaint changes the scope or theory of the case." *Fausset* v. *Mortgage First, LLC*, 2010 WL 1212085, at *4 (N.D. Ind. 2010). See also, *e.g.*, *Regions Bank* v. *Commonwealth Land Title Ins. Co.*, 2012 WL 5410948, at *3 (S.D. Fla. 2012). Otherwise, "[i]f every amendment, no matter how minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause." *E.E.O.C.* v. *Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002).[1]

Here, as the district court put it, "the changes the Amended Complaint makes to the Complaint are largely cosmetic." Pet. App. 52. A reasonable observer would thus conclude that respondent, by agreeing

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[1] There is conflict in the lower courts on this point: "District courts across the country have taken several different approaches, which can generally be classified as permissive, moderate or narrow." *Adobe Sys. Inc.* v. *Coffee Cup Partners, Inc.*, 2012 WL 3877783, at *5 (N.D. Cal. 2012). Below, petitioner sought adoption of the contrary approach, arguing that it is the "better reasoned rule." CA4 Dkt. No. 37, at 38. Given that this issue was not addressed below and it arises here obliquely via the question of waiver, this is surely not an appropriate vehicle to resolve this disputed question.

that petitioner could file an amended answer in light of respondent's intent to file a cosmetically-improved complaint, did not consent to petitioner's late assertion of an entirely new defense, far outside the scope of the amendments to the complaint. Indeed, upon first learning that petitioner sought to add a new affirmative defense, respondent objected and moved to strike. Pet. App. 6.[2]

Because late assertion of the exhaustion defense creates prejudice to respondent, the district court could not have granted petitioner leave to assert the defense late. Respondent was assaulted on July 13, 2007 (Pet. App. 3), and the statute of limitations for such a claim is three years. See *Nasim* v. *Warden, Maryland House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995). Petitioner answered the complaint on November 19, 2009. Pet. App. 5. If petitioner had asserted an exhaustion defense at that time, respondent could have pursued any state remedies he believed appropriate. By waiting until August 2011 to raise his exhaustion argument, petitioner foreclosed respondent from any such opportunity. Such delay is necessarily prejudicial. See *S. Wallace Edwards &*

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[2] The authority cited by the dissenting judge is not to the contrary. See Pet. App. 28. In *Corwin* v. *Marney, Orton Invs.*, 843 F.2d 194, 199 (5th Cir. 1988), the parties did not dispute the scope of consent. And the sort of "implied consent" at issue in *Mooney* v. *City of New York*, 219 F.3d 123, 127 n.2 (2d Cir. 2000), is lacking here, where respondent specifically objected once he learned the scope of the proposed amendment. That the objection came by way of a Rule 12(f) motion to strike—rather than an opposition to petitioner's motion to amend—was occasioned solely by the fact that the district court granted petitioner's motion within a day of its filing. Pet. App. 6. The form of respondent's objection makes no substantive or practical difference.

Sons, Inc. v. *Cincinnati Ins. Co.*, 353 F.3d 367, 373-374 (4th Cir. 2003). Even petitioner acknowledged that "there may be prejudice to the plaintiff in that the statute of limitations has run." JA489.

2. Petitioner has not proven that respondent failed to exhaust administrative remedies as a matter of Maryland state law.

Certiorari is also unwarranted because the question presented rests on an incorrect assumption concerning Maryland law. Petitioner asserts that "[n]o one disputes that [respondent] failed to exhaust his available administrative remedies before filing suit in federal court." Pet. 4-5.[3] Not so. Respondent's IIU complaint *did* satisfy his exhaustion obligation as a matter of Maryland law. At the very least, petitioner has failed to carry his burden of proving otherwise.

Because "[n]onexhaustion is an affirmative defense," "defendants have the burden of raising and proving the absence of exhaustion." *Porter* v. *Sturm*, 781 F.3d 448, 451 (8th Cir. 2015) (citing *Jones*, 549 U.S. at 211-212). See also, *e.g.*, *Moore* v. *Bennette*, 517 F.3d 717, 725 (4th Cir. 2008).

Here, as the court of appeals explained, on the same day as the incident, respondent "reported the

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[3] Petitioner's representation of the record is somewhat mystifying. Below, one of respondent's central arguments was that "because no further 'administrative remedies' were 'available' to Blake once the internal investigation was completed, * * * the internal investigation exhausted Blake's administrative remedies and fully satisfied the PLRA's exhaustion requirement." CA4 Dkt. No. 27, at 39. See also, *e.g.*, *id.* at 16 ("[U]nder the Maryland inmate-grievance system in place at the time Blake was assaulted, completion of an internal investigation exhausts all administrative remedies.").

incident to senior corrections officers and provided a written account." Pet. App. 4. As a result, "[t]he Internal Investigative Unit ("IIU") of the Maryland Department of Public Safety and Correctional Services ("Department") undertook a yearlong investigation and issued a formal report." *Ibid.*

Petitioner contends that this was not the appropriate procedure for respondent to exhaust his administrative remedies. Instead, he believes that respondent should have brought a proceeding via Maryland's Administrative Remedy Procedure ("ARP"). See Pet. App. 8; Pet. 5.

But, under the Maryland grievance procedure in force at the time, the IIU investigation was, at the very least, *an* appropriate means for grieving his claim—and it likely was the *only* means for doing so. Either way, it qualified as exhaustion under Maryland law.

To begin with, multiple federal judges have held that, once the IIU begins an investigation, a prisoner may not bring a parallel ARP proceeding. In *Thomas* v. *Bell*, 2010 WL 2779308, at *4 n.2 (D. Md. 2010), the court explained that the Department of Corrections "does not permit prisoners to pursue ARP claims for matters referred to the Internal Investigation Unit." (This case applied Maryland law prior to the recent amendment of DCD 185-003. See Pet. App. 15 n.8.) Another court held likewise in *Thomas* v. *Huff*, 2010 WL 3001992, at *3 n.2 (D. Md. 2010).

It was correct for these courts to hold that the IIU process is an appropriate means for a prisoner to grieve his claim. The governing handbook explained that the ARP process was not available for certain categories of complaints covered by other proceed-

ings, and it provided a non-exhaustive list of examples. Pet. App. 12.; *id.* at 77-78. One of those exceptions is on point—the ARP proceeding does not apply to "disciplinary hearing procedures and decisions." *Id.* at 77. The IIU investigation, as its results proved, *was* a disciplinary hearing for petitioner and Madigan. It led to charges against Madigan and the termination of his employment.

Moreover, the handbook states explicitly that "[i]nmates should try to resolve problems informally by contacting the staff who can help verbally or submit an informal complaint form." Pet. App. 78. The handbook instructs that, "*[w]hen this does not work*, an inmate may submit a formal 'Request for Administrative Remedy' form to the warden." *Ibid.* (emphasis added). The clear precondition to filing an ARP action, according to the handbook, is an ineffective complaint with prison staff.

Here, respondent did *exactly* what the handbook told him to do: he contacted prison staff to lodge his complaint. Pet. App. 4. And, far from "not work[ing]," his report triggered a formal, year-long IIU investigation that resulted in a report substantiating respondent's claim, the Department charging Madigan with offenses, and Madigan's resignation. *Id.* at 4-5. Respondent thus followed the handbook's instructions to the letter—since the IIU complaint was effective, the condition precedent to filing an ARP action was never triggered.

That is not all. State regulations provide the IIU with *mandatory* jurisdiction over claims that a prison guard uses "excessive force." Md. Code Regs. § 12.11.01.05(A)(3). When an employee is made aware of such an incident, he or she "shall immediately" report it to the IIU. *Id.* § .05(A). Indeed, if such

a claim is made in the course of an ARP proceeding, it must be reported to the IIU, too. *Id.* § .05(B). And once a complaint is made, the IIU *must* investigate and render a disposition. *Id.* § .04. It follows that the IIU *is* the proper grievance mechanism in Maryland for claims of excessive force, as Maryland law requires it to investigate such allegations, prepare a report, and then pursue appropriate remedies.

Petitioner's contrary argument appears to be that the IIU proceeding does not "provide any remedy to the inmate," and thus cannot be the proper means to exhaust respondent's claim. Pet. 6. But the IIU *did* provide respondent remedies: the investigation resulted in an administrative determination that his rights were violated, leading to the effective termination of one of the guards who attacked him. It is irrelevant that the IIU could not provide him *money*; "an inmate seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money." *Booth* v. *Churner*, 532 U.S. 731, 734 (2001). Just so here: the IIU could and indeed *did* provide respondent non-monetary relief.

As the court of appeals concluded, "[petitioner] has proffered no evidence that would contradict [respondent's] belief that the IIU's investigation removed his complaint from the typical ARP process." Pet. App. 13. It is not just that respondent's belief was objectively reasonable in this case—respondent's conduct was *correct*.

Indeed, since the incident here, Maryland has amended directive 185-003 to specify that a warden should dismiss an ARP action that overlaps with an IIU investigation. See Pet. App. 13 & n.5; JA437 This confirms that the IIU is—and always has

been—the proper administrative mechanism to investigate excessive force claims in Maryland prisons. The proper interpretation of this technical question of Maryland law is not a question warranting this Court's attention under any circumstance; that is especially so where, as here, Maryland has since amended its law to itself resolve the confusion.

B. Review of the question posed by petitioner is nonetheless unwarranted.

Setting aside these two, substantial prior questions, the issue that petitioner presents does not merit further review. There is no conflict among the circuits; petitioner fails to demonstrate that the decision below has any significance outside the narrow factual confines of this case; and the decision below is correct.

At the outset, petitioner relies on a caricature of what the court of appeals actually held. He suggests that, under the decision below, a prisoner can "circumvent a prison's grievance process by making self-serving claims that they misunderstood the grievance procedure." Pet. 18-19. Not so.

The conclusion below that respondent satisfied the PLRA exhaustion requirement rested on two necessary factors.

First, the court of appeals held that it is essential for a prisoner to show that he possessed an *objectively reasonable* belief that he had, in fact, satisfied the state-law requirements. This "ensures that an uncounseled inmate attempting to navigate the grievance system will not be penalized for making a reasonable, albeit flawed, attempt to comply with the relevant administrative procedures." Pet. App. 10.

That condition was satisfied in this case—as we have explained, multiple federal judges had interpreted Maryland's administrative exhaustion requirements in precisely the same way as respondent did. Pet. App. 14-15 n.8. That is rare and undeniable evidence that respondent "reasonably interpreted Maryland's murky inmate grievance procedures." *Id.* at 15.

Second, the prisoner's actions must trigger a response or investigation by the prison that satisfies the *substantive purpose* of the PLRA exhaustion requirement. That is, the prisoner must "afford[] corrections officials time and opportunity to address complaints internally." Pet. App. 10 (quotation omitted).

That, too, occurred here: respondent instituted an official prison investigation, which lasted more than a year and resulted in an employee's termination. Pet. App. 11.

Petitioner and his *amici* invoke the old chestnut that the PLRA is designed to decrease the frequency, while improving the quality, of prisoner litigation. See, *e.g.*, Pet. 2-4, 17-20; States *Amicus* 1, 3, 7-14. Of course this is true. But it says nothing about this case: this is just the kind of prison litigation that the PLRA is designed to permit.

- Petitioner contends that exhaustion "provide[s] 'prisons with a fair opportunity to correct their own errors.'" Pet. 3. Here, the prison *did* have the opportunity to correct its own error; its lengthy investigation substantiated respondent's claim of excessive force, led to charges against Madigan, and caused Madigan's termination. Pet. App. 4-5, 11.

- Petitioner contends that exhaustion improves the aggregate quality of prisoner suits by "'persuading' some prisoners 'not to file an action.'" Pet. 3. But this is the sort of action that *should* be brought; respondent has *already* won a $50,000 jury verdict. Pet. App. 6; JA570.
- Petitioner contends that exhaustion "creat[es] an administrative record that would assist courts in evaluating the merits of the cases." Pet. 3-4. Here, respondent's administrative complaint created a lengthy record, including an official report that substantiated his claim. Pet. App. 4-5; JA27-67. The clear record caused the district court to appoint private counsel. Pet. App. 5.

As the court of appeals put it, "[t]he Department certainly had notice of Blake's complaint, as well as an opportunity to develop an extensive record and address the issue internally." Pet. App. 11.

Against this backdrop, further review is unwarranted.

1. There is no conflict among the circuits.

As we just explained, the holding below turned on two necessary conditions—that respondent demonstrated it was *objectively reasonable* for him to believe that he had exhausted Maryland's administrative remedies, *and* that he showed *substantive compliance* with the purposes of the exhaustion requirement. Those conditions will rarely be satisfied. It thus comes as little surprise that petitioner has failed to identify any court of appeals that was presented with those same conditions and reached a contrary result.

In petitioner's leading case, *Chelette* v. *Harris*, 229 F.3d 684 (8th Cir. 2000), the plaintiff could prove neither element. It was accepted that the prisoner "likely could have filed a separate grievance over the alleged lack of medical care." *Id.* at 686. The prisoner admitted as much—in response to the question "Did you present the facts relating to your complaint in the state prisoner grievance procedure?" printed on the form complaint, "Chelette placed a check next to 'No.'" *Id.* It was not, therefore, objectively reasonable for him to believe that he had exhausted his administrative remedies. *Id.* Additionally, there was no indication that *any* investigation actually occurred, much less one that satisfied the substantive purpose of the exhaustion requirement. *Id.* There is therefore nothing inconsistent about the outcome in *Chelette* and the outcome here.[4]

Petitioner next points to the Fifth Circuit's per curiam decision in *Gonzalez* v. *Seal*, 702 F.3d 785, 787 (5th Cir. 2012). But *Gonzalez* addressed an entirely different question: whether a prisoner can complete the exhaustion requirement *during* the pendency of the federal suit. *Id.* at 788. The Fifth Circuit's holding that pre-suit exhaustion is required says absolutely nothing as to the very different question posed here. Nothing in the decision below would suggest, much less compel, a different outcome to the question present in *Gonzalez*.

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[4] *Chelette* rejected a prisoner's ignorance of the administrative remedy system as an insufficient basis to set aside the requirement. 229 F.3d at 688. The court below agrees: "an inmate's ignorance of available procedures is not sufficient to excuse a failure to exhaust remedies." Pet. App. 12 n.4.

Petitioner briefly addresses "decisions of the Sixth, Seventh, and Ninth Circuits" regarding internal investigations, but he admits that they also did not confront the issue posed here—they "did not consider the applicability of a reasonable belief exception." Pet. 13-14. Instead, each case arose against a state law backdrop where, unlike here, it was clear that the internal investigation process was distinct from the proper mechanism for administrative relief.

The Seventh Circuit's decision in *Pavey* v. *Conley*, 663 F.3d 899, 905 (7th Cir. 2011), establishes the uncontroversial proposition that "*[w]hen* administrative procedures are *clearly laid out*, * * * an inmate must comply with them in order to exhaust his remedies." Emphasis added. One of our central points is that the administrative procedures in this case were far from "clearly laid out." See, *infra*, 14-18. In fact, *Pavey* actually *supports* our position: "what if," the Seventh Circuit considered, "prison officials misled Pavey into thinking that by participating in the internal-affairs investigation, he had done all he needed to initiate the grievance process?" *Id.* at 906. In such circumstances, an "administrative remedy is not 'available,' and therefore need not be exhausted." *Ibid.* That is strong support for the outcome here. See, *infra*, 30-32.

The Ninth Circuit's decision in *Panaro* v. *City of North Las Vegas*, 432 F.3d 949, 950 (9th Cir. 2005), is more of the same. There, the prisoner did "not take[] advantage of an internal grievance procedure." *Ibid.* After he filed an initial grievance, the matter was decided adversely to him, he was informed of his "right to appeal the decision," but he declined to appeal. *Id.* at 951. A prisoner who initiates the appropriate grievance process, but fails to complete it, can

hardly suggest that he had an objectively reasonable belief that he had properly exhausted his remedies. Once again, the result in *Panaro* is not at odds with the decision below.

And *Thomas* v. *Woolum*, 337 F.3d 720, 723 (6th Cir. 2003), to which petitioner dedicates a mere sentence (Pet. 14), is not in conflict, either. There, the prisoner "invoked the formal grievance procedure," but his "grievance did not contain the necessary information" to qualify as exhaustion. *Id.* at 723, 735. He also filed it out-of-time. *Id.* at 724. For both of these reasons, the prisoner there could demonstrate neither an objectively reasonable belief that he had in fact exhausted available remedies nor that the state had actually investigated the claims at issue.

Finally, despite earlier contending that the lower court aligned with the Second Circuit (Pet. 11-12), petitioner backtracks and contends (*id.* at 14) that the decision here is in tension with *Ruggiero* v. *County of Orange*, 467 F.3d 170 (2d Cir. 2006). That is wrong. Rather, the court expressly held that a prisoner's argument that he invoked an internal investigation proceeding is distinct from the issue here—"special circumstances, such as a reasonable misunderstanding of the grievance procedures, [that] justify the prisoner's failure to comply with the exhaustion requirement." *Id.* at 175. *Ruggiero* is thus proof that the decisions in *Pavey*, *Panaro*, and *Thomas* do not conflict with the result here: the Second Circuit holds that a prisoner with an objectively reasonable belief, like respondent here, may not be barred from a claim, but it also holds that a prisoner's initiation of an internal investigation, standing alone, does not suffice.

2. This case—particularly in light of Maryland's newly amended DCD 185-003—is of little practical significance.

Petitioner and his *amici* fail to demonstrate that this case presents a question of exceptional importance that warrants this Court's intervention. That is especially so because recent changes in Maryland law make the circumstances here unlikely to arise again.

a. Petitioner's primary argument—that review is warranted because prisoners file lots of lawsuits and the "decision below eviscerates the PLRA's exhaustion requirement"—is clearly wrong. Pet. 17 (capitalization omitted). See also State *Amicus* 7-14. Petitioner arrives at that hyperbolic contention by arguing that, under the decision below, a prisoner can "circumvent a prison's grievance process by making self-serving claims that they misunderstood the grievance procedures." Pet. 18-19. But that is not what the court below held—a prisoner's "self-serving" *subjective* belief has nothing to do with it. Instead, the court below requires both an *objectively reasonable* belief as well as *substantive compliance* with the purposes of exhaustion. See, *supra*, 18-19.

These elements are found in only the rarest of cases, and district courts readily understand the distinction. Recognizing, for example, that the decision below requires an *objectively* reasonable belief, one district court flatly rejected a prisoner's argument that turned on her subjective belief. Citing this case, the court held that a prisoner's "subjective belief that the ARP process would be unavailing to her complaints is not a valid basis for declining to participate in the established grievance procedure." *McBride* v.

Maryland Corr. Inst. for Women, 2015 WL 4231682, at *8 (D. Md. 2015).

The additional requirement—the substantive prong—also poses a tall hurdle. As another court recently found, "[t]he exception to the PLRA's exhaustion requirement set forth in *Blake* * * * does not apply here because * * * Mr. Reed made no reasonable attempt to avail himself of the grievance system at issue." *Reed* v. *Jones*, 2015 WL 4460322, at *4 n.5 (M.D.N.C. 2015). When a prisoner does nothing—objectively reasonable belief or not—the substantive requirement is not satisfied.

Petitioner is thus left with nothing more than a naked assertion, claiming that the decision below opens "the floodgates to frivolous prisoner complaints." Pet. 20. And the States speculate as to an "inundation of federal district courts with undeveloped and potentially nonmeritorious prisoner complaints." States *Amicus* 11. Yet no deluge has come. Neither petitioner nor his *amici* have identified a *single* case where they believe that, based on the decision below, a court wrongly denied an exhaustion defense. This is not for a lack of opportunities: more than two dozen cases have cited the decision below, and an online search reveals that, in the five months since the decision below, district courts within the Fourth Circuit have decided at least five dozen cases addressing PLRA exhaustion.

Instead, the evidence is that district courts in the Fourth Circuit, while expressly addressing the decision below, have little trouble identifying run-of-the-mill failures to exhaust.

- "Plaintiff's claims are unexhausted and subject to dismissal." *Henson* v. *Graham*, 2015 WL 3456778, at *4 (D. Md. 2015).
- "[P]laintiff's complaint is subject to dismissal for non-exhaustion." *Bishop* v. *Johnson*, 2015 WL 4377957, at *5 (D. Md. 2015).
- The plaintiff "failed properly to exhaust available remedies" as to certain claims. *Kitchen* v. *Ickes*, 2015 WL 4378159, at *8 (D. Md. 2015).
- "Plaintiff's claims are unexhausted and subject to dismissal." *Henson* v. *Bishop*, 2015 WL 4639623, at *6 (D. Md. 2015).
- "Tuell failed to exhaust available administrative remedies as to all the claims presented in his Complaint." *Tuell* v. *Comm'r of Corr.*, 2015 WL 4994022, at *6 (D. Md. 2015).
- "Defendant's Motion to Dismiss for failure to exhaust administrative remedies will be granted." *Brown* v. *Lawhorne*, 2015 WL 3464141, at *6 (D. Md. 2015).
- Dismissal for failure to exhaust. *Watkins* v. *Foxwell*, 2015 WL 3464138, at *2 (D. Md. 2015).
- Summary judgment for failure to exhaust. *Bailey* v. *Hershberger*, 2015 WL 4396580, at *4 (D. Md. 2015).
- "Atkins's claims regarding the denial of his kosher diet while at the west compound is unexhausted and is dismissed." *Atkins* v. *Md. Div. of Corr.*, 2015 WL 5124103, at *8 (D. Md. 2015).

Contrary to the unsupported assertions of petitioner and his *amici*, the exhaustion defense remains alive and well in the Fourth Circuit. Recent litigation proves that the narrow decision here is confined to the rare and exceptional facts of this case.

b. There is an additional reason to think that the circumstances here are unlikely to arise again. The court below found petitioner's belief that he had satisfied the administrative remedies requirement objectively reasonable because of the "murky" intersection between Maryland's two administrative procedures, the ARP and IIU processes. Pet. App. 12-15.

But Maryland has since fixed this problem—and it did so in a way that confirms the propriety of respondent's conduct. As recently amended, DCD 185-003 provides that, when the IIU is investigating an incident, it is the *exclusive* avenue for relief. Pet. App. 13 & n.5; JA437. A warden is now directed to dismiss an ARP complaint if "the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit." Pet. App. 13 & n.5; JA437

Carmichael v. *Hershberger*, 2015 WL 5832401 (D. Md. 2015), is illustrative of the new regime. There, the prisoner initiated both an ARP and an IIU investigation.[5] The warden dismissed the ARP because it was directed to the same incident as the IIU investigation; the prisoner did not appeal that dismissal. *Id.* at *6. The completion of the IIU investigation nonetheless qualified as proper administra-

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[5] Maryland renamed the IIU as the "Intelligence and Investigative Division" or IID. *Carmichael*, 2015 WL 5832401, at *1 & n.1. We refer to it as the "IIU" for consistency.

tive exhaustion of the prisoner's claims that it addressed. *Ibid.*

Because DCD 185-003 corrects the previous, persistent confusion in Maryland as to proper avenue to pursue an administrative remedy for excessive force claims, the circumstances that gave rise to this case cannot recur. This Court need not address a situation that is now nothing more than a historical footnote.

3. The decision below is correct.

Finally, the decision below is correct. If, contrary to our submission (*supra*, 14-18), respondent did not comply with the technical formalities of Maryland state law, his conduct nonetheless qualifies as exhaustion for purposes of the PLRA. Respondent can hardly be faulted for complying with an interpretation of state law adopted by two federal judges. Pet. App. 14-15 n.8.

This is so for two reasons. *First*, federal law deems respondent, on account of his conduct, in compliance with the state exhaustion requirement. *Second*, because of the "murk[iness]" of state law (Pet. App. 15), the administrative remedy scheme that petitioner contends was proper was not fairly "available" within the meaning of the PLRA. 42 U.S.C. § 1997e(a).

a. The PLRA exhaustion requirement stems from, and is thus informed by, "the jurisprudence of administrative law." *Woodford* v. *Ngo*, 548 U.S. 81, 88 (2006). In *Woodford*, drawing from principles of agency exhaustion law, the Court concluded that "proper exhaustion of administrative remedies" is necessary—a prisoner must comply with the steps that the relevant agency lays out. *Id.* at 90. The

Court therefore found that a prisoner, who filed his administrative claim after the deadline imposed by the prison had passed, failed to exhaust. *Id.* at 88. The Court rejected the prisoner's argument for "exhaustion *simpliciter*"—his contention that he need merely show that an administrative remedy was unavailable to him, even if its unavailability was entirely of his own making. *Ibid.*

Thus, as the Court put it, "the PLRA uses the term 'exhausted' to mean what the term means in administrative law"—"proper exhaustion." *Woodford*, 548 U.S. at 93. As Justice Breyer explained in concurrence—and the majority did not challenge—part of the administrative law delineating what qualifies as "proper exhaustion" recognizes "traditional exception[s]." *Id.* at 103-104 (Breyer, J., concurring). Justice Breyer pointed (*id.* at 104) to *Giano* v. *Goord*, 380 F.3d 670, 678 (2d Cir. 2004), where the Second Circuit identified that a prisoner's "reasonable belief" that prison regulations foreclosed a certain remedial scheme could demonstrate that a prisoner sufficiently complied with the exhaustion requirement.

This understanding lies at the heart of administrative law's exhaustion jurisprudence: a claimant cannot be required to exhaust an administrative scheme that is either unknown or unavailable. *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 847 (1999) (exhaustion of a remedy is not required when it was "unavailable"). See also *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-430 (1966); *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (administrative exhaustion is "subject to numerous exceptions").

The holding below, moreover, is consistent with the *Woodford* majority. The Court expressly recog-

nized that its decision there did not "decide" how to "address[]" a situation where a prison "create[s] procedural requirements for the purpose tripping up all but the most skillful prisoners." *Woodford*, 548 U.S. at 102-103. Given that the (since-amended) Maryland law has, as petitioner sees it, tripped up multiple federal judges (Pet. App. 14-15 n.8), *Woodford* surely does not foreclose the rule adopted below.[6]

b. The decision below is correct for a separate reason: the PLRA requires a prisoner to exhaust "such administrative remedies as are *available*." 42 U.S.C. § 1997e(a) (emphasis added). The term "available" means "capable of use; at hand." *Brown* v. *Croak*, 312 F.3d 109, 113 (3d Cir. 2002) (quoting Webster's II, New Riverside University Dictionary 141 (1994 ed.)).

The PLRA is not a license for a state to erect a maze of administrative remedies that punishes a *pro se* inmate if he chooses the wrong option. "[J]ails and prisons" may not "play hide-and-seek with administrative remedies." *Goebert* v. *Lee Cty.*, 510 F.3d 1312, 1323 (11th Cir. 2007).

The Seventh Circuit (see, *supra*, 22), is far from

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[6] Since, in *Woodford*, the Court was careful to note that it did not foreclose the kind of situation at issue here, petitioner is wrong to argue (Pet. 15) that the holding below is inconsistent with the Court's *earlier* decision in *Booth*. In *Booth*, the Court expressly limited its holding to "only" the conclusion that "an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues." 532 U.S. at 741 n.6. It reached that result by reasoning that, when Congress enacted the PLRA, it superseded *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). See *Booth*, 532 U.S. at 740-741. Petitioner does not, and cannot, make any such comparable argument here.

alone in concluding that "[a]n administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials * * * inaccurately describe the steps he needs to take to pursue it." *Pavey*, 663 F.3d at 906. The Third,[7] Fifth,[8] Ninth,[9] Eleventh,[10] and D.C.[11] Circuits all agree.

The decision below is an example of this commonplace, well-accepted rule. When an objective observer would conclude that a prisoner has done what state law requires, and when the prisoner's conduct actually triggers the sort of internal investigation the PLRA's exhaustion requirement is designed to instigate, a state cannot seriously contend that some other remedy was "available."

At the time that respondent's claim arose, Maryland's "grievance system [was] confusing enough that at least two learned judges" interpreted it to require

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[7] *Small* v. *Camden Cnty.*, 728 F.3d 265, 271 (3d Cir. 2013) ("Remedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes.").

[8] *Davis* v. *Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) ("Grievance procedures are unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process.") (emphasis omitted).

[9] *Nunez* v. *Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) ("[T]he Warden's mistake rendered Nunez's administrative remedies effectively unavailable.").

[10] *Goebert*, 510 F.3d at 1323 ("That which is unknown and unknowable is unavailable.").

[11] *DeBrew* v. *Atwood*, 792 F.3d 118, 128 (D.C. Cir. 2015) ("An administrative remedy is actually 'available' to an inmate only if it is 'present or ready for immediate use,' 'accessible,' or 'obtainable.'").

just what respondent did. Pet. App. 15 n.8. With the benefit of hindsight, petitioner now asserts that some other procedure was required, instead. But in these circumstances that alternative procedure was not "available."

Petitioner will likely reply that, in his view, the propriety of the ARP proceeding was sufficiently clear such that it was not objectively reasonable for respondent to rely on the IIU investigation. See, *e.g.*, Pet. 5-6. Indeed, that was the principal argument advanced by the dissenting judge below. Pet. App. 25-27. Since we have demonstrated that respondent in fact complied with Maryland state law (see, *supra*, 14-18), it goes without saying that, as the court of appeals concluded, any mistake he made was an objectively reasonable one. See, *supra*, 18-19. But that application of fact to settled law—determining whether respondent's belief was reasonable in *this* case, on *these* facts, against a legal framework that has since changed—does not warrant this Court's review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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No. 15-339

In The
Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Maryland and 22 *amici* States respectfully submit that the decision of the Fourth Circuit is wrong and warrants this Court's review. The Prisoner Litigation Reform Act's ("PLRA") "mandatory" exhaustion requirement was intended to "eliminat[e] judicial discretion to dispense with exhaustion." *Porter v. Nussle*, 534 U.S. 516, 524, 529-30 (2002). Accordingly, this Court has rejected every attempt to incorporate common law exceptions, emphasizing that it will "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *see also Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006).

The Fourth Circuit nonetheless fashioned an exception that violates the mandatory exhaustion regime established by Congress, has no basis in statutory text or this Court's precedents, and conflicts with the decisions of several other federal courts of appeals. Most notably, in *Chelette v. Harris*, the Eighth Circuit expressly rejected the same exception because, the court explained, it was "not free to engraft upon the statute an exception that Congress did not place there." 229 F.3d 684, 688 (8th Cir. 2000), *cert. denied*, 531 U.S. 1156 (2001) (internal quotation omitted).

Rather than mount a full-throated defense of the Fourth Circuit's decision, Mr. Blake primarily dwells on three arguments that he raised in the courts below—which no court has accepted—that would have resolved the matter without resort to a court-engrafted exception to the PLRA.

First, Mr. Blake claims that Mr. Ross waived his exhaustion defense, but neither the district court nor the court of appeals adopted this view, and the district court in fact expressly rejected it. Second, neither the district court nor the court of appeals found that Mr. Blake exhausted his administrative remedies under state law, and it is clear on the record that he did not. Finally, neither the district court nor the court of appeals held that Mr. Blake's administrative remedies were not "available" within the meaning of the PLRA. Administrative remedies were available to prisoners like Mr. Blake; he simply failed to pursue them.

These reprised arguments are no stronger now than they were when the courts below consciously declined to adopt them, and hence they do not render this case a poor vehicle to resolve the conflict created by the Fourth Circuit's decision.

In recognizing an exception for Mr. Blake, the Fourth Circuit produced a conflict with five other circuits and an inviting route by which to circumvent the PLRA's exhaustion requirement. As Maryland and 22 *amici* States now request, this Court should grant certiorari to resolve the conflict among the circuits and protect federal courts from a new wave of frivolous prisoner claims.

I. THIS COURT SHOULD REJECT ATTEMPTS TO INVENT OBSTACLES TO REVIEW.

1. Mr. Blake resurrects a waiver issue that the district court rejected out of hand. *See* Pet. App. 52-54. The Fourth Circuit also did not rely on this ground, which is "easily resolved." Pet. App. 27 Although Mr. Ross did not include the exhaustion defense in his original answer, he obtained consent from Mr. Blake's counsel to file an amended answer raising the defense. Pet. App. 52. Mr. Blake now protests that he did not intend to consent to that amendment. Opp. 12-13. But Mr. Blake "did not condition his consent in any relevant way or even ask to review the proposed answer before it was filed. He cannot now complain about untimeliness when he blindly approved [the amended answer]." Pet. App. 27-28.

In return for his consent, Mr. Blake's counsel asked for blanket consent from Mr. Ross's counsel to file an untimely amended complaint, which added significant new factual allegations against Ross. Dist. Ct. Doc. No. 75 Ex. 1; *see also* JA480, 482. Mr. Blake, having received the benefit of this quid pro quo, cannot retract the blanket consent that served as the basis for the deal. Under these circumstances, it is no surprise that neither the district court nor the court of appeals accepted Blake's waiver argument below.

2. Mr. Blake next claims that the Fourth Circuit should have found that he exhausted his available remedies as a matter of state law In this respect, Mr. Blake recites an unmeritorious argument that the district court and court of appeals declined to adopt. Maryland's administrative remedy procedure is available for "all types of complaints except" those in

four limited categories. Pet. App. 77-78. Nothing in the handbook or directives implies that these four enumerated exceptions are somehow "non-exhaustive." Opp. 16. To the contrary, as the handbook plainly states, the procedure applies to "all" other complaints. Pet. App. 77

Mr. Blake also posits, apparently for the first time, that he did not need to exhaust the remedies process because he was allowed to "resolve problems informally" through an internal investigation. Opp. 16. But in fact his complaint was not resolved, and could not have been resolved, in this way, formally or informally. Unlike the administrative remedies available to Mr. Blake, internal affairs investigations serve the prison's own purposes. They are no substitute for the established procedures that Mr. Blake was required to follow. The prison directives explicitly provide that the administrative remedy procedure applies to "[u]se of force" complaints. Pet. App. 17; *see also* JA405. Mr. Blake would have known this if he had read the relevant directives or asked for assistance, but he did neither. Pet. App. 71, 78. He is not free to do nothing and now claim that he misunderstood the process.

Mr. Blake is also wrong that "multiple" federal judges have agreed with his mistaken interpretation. Opp. 15. Both cases cited for this proposition were decided by Judge Williams, who also presided over this case; in the other cases, Judge Williams relied on "a new department directive that went into effect long after the time when Blake needed to file his

administrative complaint."[1] Pet. App. 26. When presented with the directives that applied in *this* case, Judge Williams had no difficulty interpreting them. He instead found "very little, if any, ambiguity in Maryland's inmate grievance procedures" and specifically held that Mr. Blake failed to exhaust them. Pet. App. 41-42. Thus, contrary to Mr. Blake's representation, the 2008 amendments to the directives did not codify pre-existing practice.

3. Finally, Mr. Blake strains to justify the court of appeals' decision by arguing that the prison's remedy procedure was not "available" within the language of the PLRA. Opp. at 30-31. The Fourth Circuit did not rely on this ground, and for good reason. A remedy is not unavailable merely because a prisoner claims to have misunderstood the process. Rather, as Mr. Blake's own cases show, a remedy is only unavailable when prison officials affirmatively mislead an inmate by providing inaccurate information or affirmatively refuse to provide any information about the process to an inmate.

For example, in *Goebert v. Lee County*, 510 F.3d 1312, 1321-23 (11th Cir. 2007), "no inmate was ever permitted to see th[e] procedures," and the prison made no attempt to explain them. Mr. Blake received an

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[1] Although Mr. Blake points out that one of these cases was filed before the amended directive went into effect, *see* Opp. 15, Judge Williams did not actually interpret the old directive that applies here but instead mistakenly looked to the new directive. As Judge Agee explained, Judge Williams accidently relied on "an exhibit in another case that prove[d] to be an administrative decision dismissing a complaint under the 2008 policy," not the one that applied to Mr. Blake. Pet. App. 27.

orientation on grievance procedures, was provided an accompanying handbook, and could have sought guidance if needed from the prison's administrative remedy coordinator. Pet. App. 70-71, 74-75, 78. All the cases cited by Mr. Blake uniformly involve affirmative misinformation or misconduct by prison officials.[2] That is not the case here. Mr. Blake's failure to follow the process was the result of his own inaction, not any misstatements by prison officials.

II. THIS COURT'S INTERVENTION IS NECESSARY TO RESOLVE DISAGREEMENT AMONG THE CIRCUITS.

The Fourth Circuit's decision conflicts with the decisions of five other circuits. *Chelette*, 229 F.3d at 688; *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam); *Pavey v. Conley*, 663 F.3d 899, 905 (7th Cir. 2011); *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953-54 (9th Cir. 2005); *Thomas v. Woolum*, 337 F.3d 720, 734 (6th Cir. 2003), *abrogated on other grounds by Woodford*, 548 U.S. at 87. Mr. Blake's attempt to distinguish these cases on factual grounds is unpersuasive because the factual differences among the cases do not bear on the fundamental legal questions on which six circuits now disagree.

In *Chelette*, for example, the Eighth Circuit rejected an exception that would have applied to inmates who

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[2] *See Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) (prison staff told inmate that process did not have a second step, even though it did); *DeBrew v. Atwood*, 792 F.3d 118, 128 (D.C. Cir. 2015) (prison officials refused to provide the inmate with necessary documents to lodge his complaint); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (warden sent inmate on a "wild goose chase" by referring inmate to the wrong regulation).

"logical[ly] believed" they had exhausted their remedies. *See* 229 F.3d at 688. Mr. Blake argues that *Chelette* is distinguishable because the inmate's belief in that case was not objectively reasonable. Opp. 21. But the Eighth Circuit did not reject the plaintiff's claim on the ground that his particular belief was unreasonable or illogical, but held that a prisoner's beliefs about the process are irrelevant under the PLRA, whether they were "logical or otherwise," because Congress did not provide for any logical belief exception. *Chelette*, 229 F.3d at 688. This holding directly conflicts with the Fourth Circuit's decision adopting such an exception.

Similarly, the Fifth Circuit's rationale in *Gonzalez v. Seal* rejected all purported common law exceptions, no matter the underlying facts. The court specifically overruled an earlier decision that had allowed the exhaustion requirement to be "excused" in "certain rare instances." *Gonzalez*, 702 F.3d at 787-88.

Finally, the Fourth Circuit's decision also conflicts with decisions of the Sixth, Seventh, and Ninth Circuits. *See Pavey*, 663 F.3d at 905; *Panaro*, 432 F.3d at 953-54; *Thomas*, 337 F.3d at 734. Mr. Blake argues that these cases do not conflict because the procedures in those states were not confusing, Opp. 22-23, but the Fourth Circuit's test has two prongs, the second of which is whether the prisoner's mistaken attempts to exhaust served the same substantive purposes as the exhaustion requirement. Pet. App. 10. These other decisions conflict with that second prong because they hold that internal investigations do not serve the same purposes as grievance procedures.

III. THE FOURTH CIRCUIT ERRED IN ADOPTING A REASONABLE BELIEF EXCEPTION.

1. This Court has "consistently refused to authorize judicially created exceptions to the [PLRA's] exhaustion requirement." *Johnson v. District of Columbia*, 869 F Supp. 2d 34, 42 (D.D.C. 2012); *see also Booth*, 532 U.S. at 741 n.6; *Woodford*, 548 U.S. at 91 n.2. The Fourth Circuit, however, departed from this consistent precedent and adopted just such an exception. Mr. Blake contends that "administrative exhaustion is 'subject to numerous exceptions,'" Opp. 29 (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)), but he ignores the difference between judicially-created and statutorily-imposed exhaustion.

Although "sound judicial discretion governs" when Congress has not spoken to the issue, *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), the federal judiciary's power to excuse a statutory exhaustion requirement is far more limited. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982).

Thus, "[w]here Congress specifically mandates, exhaustion is required." *McCarthy*, 503 U.S. at 144. Under this settled principle, federal courts "are not free to rewrite the statutory text" to excuse an "unambiguous" exhaustion requirement like the one at issue here. *McNeil v. United States*, 508 U.S. 106, 111 (1993); *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (refusing to import common law exceptions into Social Security Act's statutory exhaustion requirement). A court is "not at liberty to create an exception" to a "mandatory" precondition to suit "where Congress has declined to do

so." *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27, 31 (1989).

The language of the PLRA does not permit broad common law exceptions from administrative law. To the contrary, as long as administrative remedies are "available," exhaustion is required. 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement superseded a prior provision that afforded federal judges considerable discretion to excuse an inmate's failure to exhaust. *See Porter*, 534 U.S. at 524. Congress thus intended the PLRA to "eliminat[e] judicial discretion to dispense with exhaustion," *id.* at 529, not to authorize the federal courts to create broad new exceptions.

2. Even if federal courts were permitted to read common law exceptions into the PLRA, there is no support anywhere for a reasonable belief exception. Neither the Fourth Circuit in *Blake*, the Second Circuit in *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), nor Mr. Blake in his brief identified any case that has ever applied the exception outside the PLRA context. Assuming the exception exists, it conflicts with the requirement of proper exhaustion recognized by this Court in *Woodford*. *See* Pet. 14-16.

Mr. Blake contends that *Woodford* reserved the question of whether there is a reasonable belief exception to the PLRA. Opp. at 29-30. If anything, this only amplifies the need for clarity from this Court in light of the resulting disagreement among the courts of appeals in the wake of *Woodford*.

3. Finally, the Fourth Circuit misapplied its own exception. Mr. Blake's interpretation of Maryland's procedures could not have been "objectively reasonable," both because the procedures were clear and because Mr. Blake did not actually try to interpret them. Similarly, the internal affairs investigation could not have served the same substantive purposes as the prison's grievance process. The inmate is not entitled to learn the outcome of an internal investigation, Pet. App. 70, and even if an inmate could potentially receive some relief, this Court "has rejected any suggestion that prisoners are permitted to pick and choose how to present their concerns to prison officials." *Pavey*, 663 F.3d at 905.

IV. AS MARYLAND AND 22 *AMICI* STATES EXPLAIN, THIS ISSUE IS OF EXCEPTIONAL IMPORTANCE.

The exhaustion requirement was "a centerpiece" of the PLRA's effort to reduce the number of prisoner suits clogging the federal courts. *Woodford*, 548 U.S. at 84. The Fourth Circuit's rule undermines that requirement by allowing inmates to obtain relief in federal court even if they fail to follow the proper procedures.

If the exception can be satisfied under the factual circumstances of this case, there is a substantial risk that it will be read just as broadly in other cases. Here, the court found that Mr. Blake's supposed interpretation of the directives was reasonable even though he failed to read them. Two district courts in the Fourth Circuit have already relied on *Blake* to

reject an exhaustion defense,[3] and many district judges in the Second Circuit have applied that circuit's identical reasonable belief exception from *Giano*.[4]

While the exception will not apply in every case, the existence of the exception will inevitably increase the number of prisoner suits. Inmates who failed to exhaust their administrative remedies will now file suit hoping that the federal courts will excuse their failure. Inmates will have less incentive to exhaust if they believe they can obtain relief without following the proper procedure, and thus fewer cases will be resolved through the administrative process. Indeed, after the Second Circuit decided *Giano*, the number of prisoner

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[3] *Hernandez v. Vale*, No. DKC–14–1562, 2015 WL 4545184 (D. Md. July 27, 2015); *Thompson-Burke v. Harrison*, No. 5:13-CT-3091-F, 2015 WL 3902066 (E.D.N.C. June 24, 2015).

[4] *E.g.*, *Williams v. Doe*, 2015 WL 1567498, at *3 (W.D.N.Y. Apr. 8, 2015); *Frasier v. McNeil*, 2015 WL 1000047, at *8 (S.D.N.Y. Mar. 5, 2015); *Winfield v. Bishop*, 2013 WL 4736378, at *6 (N.D.N.Y. Sept. 3, 2013); *Tompkins v. Beane*, 2012 WL 3079537, at *4 (N.D.N.Y. July 30, 2012); *Andrews v. Cruz*, 2010 WL 1142010, at *9 (S.D.N.Y. Mar. 9, 2010), report and recommendation adopted, 2010 WL 1141182 (S.D.N.Y. Mar. 24, 2010); *Franklin v. Oneida Corr. Facility*, 2008 WL 2690243, at *7 (N.D.N.Y. July 1, 2008); *Tyree v. Zenk*, 2007 WL 527918, at *8 (E.D.N.Y. Feb. 14, 2007); *Pierre v. County of Broome*, 2007 WL 625978, at *4 (N.D.N.Y. Feb. 23, 2007); *Lawyer v. Gatto*, 2007 WL 549440, at *5 (S.D.N.Y. Feb. 21, 2007); *Partee v. Goord*, 2007 WL 2164529, at *4 (S.D.N.Y. July 25, 2007); *Hairston v. LaMarche*, 2006 WL 2309592, at *11 (S.D.N.Y. Aug. 10, 2006); *Larkins v. Selsky*, 2006 WL 3548959, at *10 (S.D.N.Y. Dec. 6, 2006); *Rivera v. Pataki*, 2005 WL 407710, at *12 (S.D.N.Y. Feb. 7, 2005); *Barad v. Comstock*, 2005 WL 1579794, at *8 (W.D.N.Y. June 30, 2005).

suits filed in that circuit skyrocketed by over 70% from 1,372 in 2004 to 2,308 in 2014.[5]

Finally, Mr. Blake is wrong that this case is merely "a historical footnote." Opp. 28. Nothing in the Fourth Circuit's opinion is limited to Mr. Blake's particular factual circumstance. This is why 22 States have submitted an *amicus* brief urging this Court to grant certiorari. The Fourth Circuit's broad, misguided exception could just as easily apply to any State's grievance procedures or to other provisions of Maryland's regulations.

As Judge Agee explained, "jail officials must [now] anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." Pet. App. 26. This Court's intervention is therefore necessary to prevent the PLRA's exhaustion requirement from turning "into a largely useless appendage." *Woodford*, 548 U.S. at 93.

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[5] United States Courts, *Statistics & Reports*, Table C-3—U.S. District Courts—Judicial Business Tables (Sept. 30, 2004 and Sept. 30, 2014).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Supreme Court, U.S.
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No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 21 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Fourth Circuit misapply this Court's precedents in holding, in conflict with several other federal courts of appeals, that there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he has satisfied exhaustion by participating in an internal investigation?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE* [1]

Amici curiae—the States of West Virginia, North Carolina, South Carolina, Virginia, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, and Washington—submit this brief because the Fourth Circuit's decision to adopt a common-law exception to the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") will burden States with increased and lower quality litigation by prisoners. As this Court has recognized, the PLRA was "intended to 'reduce the quantity and improve the quality of prisoner suits,'" *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006) (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)), and the exhaustion requirement was a "centerpiece" of that effort, *id.* at 84. In finding that the exhaustion requirement is "not absolute" and adopting an exception for circumstances where a prisoner reasonably believes he or she has exhausted all administrative remedies, the Fourth Circuit has necessarily exposed States not only to a greater number of federal filings by state inmates, but to more filings that have not been developed through the administrative process. This risk is particularly

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[1] Pursuant to Supreme Court Rule 37.2(a), the amici have timely notified counsel of record of their intent to file an amicus brief in support of Petitioner.

acute for those States in the Fourth Circuit, all of which other than Maryland (which is the real party in interest to the Petition) have joined this brief.

SUMMARY OF ARGUMENT

This Court's intervention is needed for two reasons.

First, the Fourth Circuit's judicially created exception to the PLRA's exhaustion requirement is squarely at odds with decisions of this Court and several sister Circuits. Petitioner has well explained many of the inconsistencies, but *amici* focus in this brief on two additional ways in which the opinion below directly contravenes this Court's controlling decisions. Specifically, this Court has noted that the PLRA amended federal law to remove the condition that a prison's administrative remedies be "'plain, speedy, and effective' before exhaustion could be required." *Booth v. Churner*, 532 U.S. 731, 739 (2001). But the Fourth Circuit's new exception, which focuses on a reviewing court's perception of the clarity of a prison's administrative procedures, effectively reinstates the requirement that such remedies be "plain." In addition, by creating a new exception by judicial fiat, the Fourth Circuit failed to follow this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), which makes clear that courts are not to "read in" to the PLRA new requirements or exceptions that they think might "make it better." *Id.* at 216.

Second, the Fourth Circuit's decision will burden States and federal district courts with increased and lower quality prisoner litigation. Like the exception this Court rejected in *Woodford*, the Fourth Circuit's exception here "w[ill] make the PLRA exhaustion scheme wholly ineffective." 548 U.S. at 95. Now every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, has an incentive simply to file in court and take a chance on arguing that he or she found the State's administrative grievance procedures to be confusing. There will be many more petitions, and they will lack the benefit of having had a record developed through an administrative process. Moreover, a greater number of prisoner petitions will survive dismissal for failure to exhaust and proceed to summary judgment or trial.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Exception to the PLRA's Exhaustion Requirement Conflicts with Precedent of Other Circuits and of This Court.

A. In the decision below, the Fourth Circuit adopted a new common-law exception to the PLRA's exhaustion requirement. Relying on Justice Breyer's concurrence in *Woodford v. Ngo*, 548 U.S. 81 (2006), the Fourth Circuit concluded that the exhaustion requirement is "strict[]" but "not absolute." *Blake v. Ross*, 787 F.3d 693, 698 (4th Cir. 2015). The appeals court found it permissible to "read[] longstanding

administrative law exceptions into the PLRA's exhaustion requirement." *Id.*

Based on decisions from the Second Circuit, the Fourth Circuit adopted a two-pronged inquiry for determining whether to excuse a prisoner's failure to exhaust in light of the inmate's "reasonable belief that no further remedies were available." *Id.* (internal quotations omitted). *First*, was the prisoner "justified in believing that his complaints in the disciplinary appeal procedurally exhausted his administrative remedies because the prison's remedial system was confusing"? *Id.* *Second*, did "the prisoner's submissions in the disciplinary appeals process exhaust[] his remedies in a substantive sense by affording corrections officials time and opportunity to address complaints internally." *Id.*

B. This judicially created exception to the PLRA is at odds with the prevailing case law. As Petitioner has well explained, the Fourth Circuit's decision is inconsistent with decisions of several sister Circuits, Pet. at 11-14, and precedent of this Court, *id.* at 15-17. *Amici* will not repeat those arguments, but rather note two additional ways in which the opinion below directly contravenes this Court's controlling decisions.

1. Relying on the statutory history of the PLRA, this Court in *Booth v. Churner*, 532 U.S. 731 (2001), required a prisoner to exhaust administrative remedies even though the administrative process

"could not award him the monetary relief he sought." *Id.* at 735. Among other arguments, this Court stressed that the PLRA "amendments [had] eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy, and effective' before exhaustion could be required." *Id.* at 739. By eliminating the requirement that an administrative remedy be "effective," this Court reasoned, Congress enacted a "broader exhaustion requirement" and made clear that it wanted prisoners to go through the administrative process even if they cannot obtain the relief they desire. *Id.* at 740-41.

In *Woodford v. Ngo*, 548 U.S. 81 (2006), this Court again emphasized the statutory changes made by the PLRA. Prior to the PLRA, this Court explained, federal law included "a weak exhaustion provision." *Id.* at 84. Exhaustion was "in large part discretionary" and "could be ordered only if the State's prison grievance system met specified federal standards." *Id.* The PLRA "strengthened" the exhaustion requirement. *Id.* at 85. "Exhaustion is no longer left to the discretion of the district court, but is mandatory." *Id.* Moreover, "[p]risoners must now exhaust all 'available' remedies, not just those that meet federal standards." *Id.* The Fourth Circuit's decision cannot be squared with this Court's repeated emphasis on the statutory history of the PLRA. As this Court has found time and again, with the PLRA Congress eliminated the condition that an administrative remedy be "plain." *Booth*, 532 U.S. at

739; *Woodford*, 548 U.S. at 84-85; see also *Porter v. Nussle*, 534 U.S. at 524. ("All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'"). But the Fourth Circuit's new exception, which focuses on a court's perception of the clarity of a prison's administrative procedures, reinstates that requirement. *Blake*, 787 F.3d at 698. Indeed, this new exception not only mandates that a prison's administrative process be "plain," but also requires that the prison have provided materials that affirmatively "contradict [an inmate's] belief that he had exhausted his administrative remedies." *Id.* at 700. As Judge Agee explained in dissent, "jail officials [now] must anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Id.* at 705 (Agee, J., dissenting). That is not simply "a substantial new burden on state corrections officials," *id.*; it is completely contrary to this Court's precedent. *Cf. Ackerman v. Ritter*, No. CIV04CV02605 2006 WL 346790, at *3 (D. Colo. Feb. 14, 2006) ("Even if the prisoner was confused with regard to the prison grievance system, and understood his claim to be non-grievable, exhaustion is required Congress has eliminated the courts' discretion to dispense with administrative exhaustion and to impose any condition that administrative remedies be plain, speedy, and effective.") (citations omitted).

2. The Fourth Circuit's decision also contravenes *Jones v. Bock*, 549 U.S. 199 (2007). In that case, this Court rejected the Sixth Circuit's attempt to require that a prisoner plead exhaustion in his or her complaint in order to effectuate the PLRA's screening requirement for unexhausted cases. *Id.* at 216-17. Acknowledging that there may be reasonable policy interests behind that judicially created requirement, this Court stressed that "the judge's job is to construe the statute—not to make it better." *Id.* at 216. What the PLRA does not expressly include the courts "must not read in by way of creation." *Id.* (internal quotations omitted)

But that is precisely what the Fourth Circuit has done here. There is no exception in the PLRA to the exhaustion requirement for a prisoner's "reasonable" failure to exhaust. Under *Bock*, the Fourth Circuit had no authority to "read in" such an exception "by way of creation." The Fourth Circuit ignored this Court's express command that "a judge's job is to construe the [PLRA]," not to append to the statute what he or she thinks might "make it better." See *Id.*

II. The Fourth Circuit's Decision Will Burden States and Federal District Courts With Increased and Lower Quality Prisoner Litigation.

A. As this Court has explained, the PLRA's exhaustion requirement was a "centerpiece" of

Congress's effort to bring "a sharp rise in prisoner litigation" "under control." *Woodford*, 548 U.S. at 84. At the time of the PLRA's enactment, "an ever-growing number of prison-condition lawsuits were threatening to overwhelm the capacity of the federal judiciary." *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 676 (4th Cir. 2005). The PLRA was "intended to 'reduce the quantity and improve the quality of prisoner suits.'" *Woodford*, 548 U.S. at 93-94 (quoting *Nussle*, 534 U.S. at 524).

A strong exhausation requirement was critical for several reasons. *First*, "exhaustion requirements are designed to deal with parties who do not want to exhaust," which tends to be the case with prisoners. *Id.* at 90; see also *id.* at 89 ("Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust."); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir. 1998) ("The PLRA was designed to discourage the initiation of litigation by a certain class of individuals—prisoners—that is otherwise motivated to bring frivolous complaints as a means of gaining a short sabbatical in the nearest Federal courthouse." (internal quotation marks omitted)).

Second, if followed, exhaustion requirements will reduce the number of prisoner lawsuits. "Proper exhaustion reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by

the proceedings not to file an action in federal court." *Woodford*, 548 U.S. at 94. Thus, as Petitioner notes, "the PLRA had an immediate remedial effect when it was enacted in 1996, with the number of [prisoner] suits returning to and remaining at more manageable levels." Pet. at4.

Finally, exhaustion requirements also improve the quality of prisoner litigation. "[P]roper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court." *Woodford*, 548 U.S. at 94-95. Specifically, "[w]hen a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Id.* Moreover, an exhaustion requirement will "filter out the bad claims and facilitate consideration of the good." *Jones*, 549 U.S. at 204. It "affor[ds] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case," providing "prisons with a fair opportunity to correct their own errors." *Woodford*, 548 U.S. at 93-94 (internal quotations omitted). Exhaustion requirements thus help address "the challenge [of] ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones*, 549 U.S. at 203.

B. 1. It stands to reason that a weakened exhaustion requirement—indeed, one that reinstates one of the pre-PLRA qualifiers that Congress eliminated to strengthen the exhaustion requirement—will trigger an increased number of prisoner complaints in court that have not been vetted or developed through the administrative process. Like the exception this Court rejected in *Woodford*, the Fourth Circuit's exception here "would make the PLRA exhaustion scheme wholly ineffective." 548 U.S. at 95. As this Court observed in *Woodford*, "[a] prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction, and under [the Fourth Circuit's] interpretation of the PLRA noncompliance carries no significant sanction." *Id.*

In the case below, the Fourth Circuit turned the exhaustion requirement into "a largely useless appendage." *Id.* at 93. The court excused Blake's failure to exhaust the prison's administrative process, even though Blake admitted that he had not read all of the prison's materials relating to the administrative process. The court found that the prison's materials were confusing simply because they did not *specifically* contradict Blake's particular, alleged misunderstanding.[2] And the court

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[2] Contrary to the majority's conclusion, Maryland's grievance procedures were not ambiguous or otherwise confusing. *Blake*, 787 F.3d at 702 (Agee, J., dissenting). As Judge Agee explained in his dissent, "[o]ne can hardly imagine a plainer provision

determined that the prison administrators had sufficient opportunity to develop an administrative record, even though Blake did not initiate any procedures with the prison, requested at one point that the investigation be closed, and expressly disavowed any intent to sue anyone. 787 F.3d at 704-05. (Agee, J., dissenting).

There can be no doubt that prisoners—especially those in the Fourth Circuit—will see this decision as an invitation to file suit in court even where they have clearly failed to follow their prisons' administrative procedures. Though the case below involved Maryland's administrative review procedures, nothing in the opinion suggests that the Fourth Circuit's new exception will not apply to other States. In adopting the exception from the Second Circuit, the Fourth Circuit described the test broadly as an "appropriate balance between statutory purpose and our administrative jurisprudence." *Id.* at 698. The inevitable result of the Fourth Circuit's broad exception will be the very scenario the PLRA was meant to prevent—the inundation of federal district courts with undeveloped and potentially nonmeritorious prisoner complaints. Now every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, has an incentive simply to file in court and

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that more directly applies to Blake's present claim," as Maryland's procedures "specifically instruct[] prisoners to use the [administrative remedy procedure] to 'seek relief ... for issues that include ... [u]se of force.'" *Id.* at 702.

take a chance on arguing that his or her state's administrative grievance procedures are confusing.

2. The potential increased burden on federal district courts and the States that face such lawsuits is enormous. As the statistics below from several Fourth Circuit States show, the PLRA's exhaustion requirement has clearly been effective in limiting the number of suits filed by prisoners in federal court. The number of suits filed in federal court has been small compared to the number of administrative grievances, which in turn has been small compared to the total number of state prisoners. The flipside of this effectiveness, however, is the potential for a significantly greater number of filings in court as prisoners learn of the Fourth Circuit's decision.

In West Virginia, for example, the number of prisoner petitions filed in fiscal year 2013-14 in federal court alleging civil rights or prison condition issues was 2.4% of the number of total inmates housed in state prisons. According to the West Virginia Division of Corrections ("WV DOC"), there were aproximately 6,973 inmates housed in its facilities on December 31, 2013. That same year, there were approximately 1,505 prisoner grievances and disciplinary actions appealed to the Commissioner in accordance with the WV DOC administrative review procedures, and only 164 prisoner petitions alleging civil rights or prison condition issues filed in the Northern and Southern Districts of West Virginia by WV DOC inmates. App.

at 2.

In Maryland, the ratio of similar prisoner petitions filed in federal court over that same time period to the total number of inmates was only 2.3%. Maryland reports that its Department of Corrections ("MD DOC") housed approximately 21,500 inmates in its correctional facilities. In calendar year 2013, the MD DOC received approximately 20,193 formal prisoner complaints through its Administrative Remedy Procedure, which are reviewed and resolved by the warden. See also Pet. App. 77-81. Of these formal complaints, approximately 2,452 were appealed to the Commissioner, and then aproximately 2,321 were appealed to the Inmate Grievance Office, which is the final step in the administrative review process. The Administrative Office of the U.S. Courts reports that in fiscal year 2013-2014, MD DOC inmates ultimately filed 489 prisoner petitions in the District of Maryland alleging civil rights or prison condition issues. App. at 2.

Finally, over the same time period in North Carolina, the number of prisoner petitions filed in federal court alleging civil rights or prison condition issues was 1.9% of the number of total inmates housed in state prisons. According to the North Carolina Department of Public Safety ("NCDPS"), there were aproximately 37,319 inmates as of January 1, 2014. That year, the NCDPS Inmate Grievance Resolution Board, which oversees the final

step in the State's administrative review procedures, received approximately 14,654 grievances. And ultimately, the federal courts report that there were 697 prisoner petitions from NCDPS inmates pending in the U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina that alleged civil rights or prison condition issues. App. at 2.

C. The increased burden on the system will come not only from a greater number of filings in court, but also from a greater number of prisoner petitions that survive dismissal for failure to exhaust and proceed to summary judgment or trial. From January 1, 2014 through September 2015, according to Maryland's internal database, the District of Maryland dismissed in whole or in part for failure to exhaust approximately 53% of the prisoner civil rights suits in which the court addressed the exhaustion defense raised by Office of the Attorney General of Maryland.

Under the Fourth Circuit's new exception, at least some of these petitions would have survived dismissal and proceeded to summary judgment or trial, creating an additional burden on both the District of Maryland and the Maryland Attorney General's Office.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Table C-3.
U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2014

Circuit and District	Total Civil Cases	U.S. Cases															
		Total U.S. Civil Cases	Contract	Real Property	Tort Action	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Prison Civil Rights	Prisoner Petitions: Prison Condition	Prisoner Petitions: Mandamus and Other	Habeas Corpus Alien Detainee	Forfeitures and Penalties	Labor Suits	Social Security	All Other
TOTAL	296,310	44,943	2,416	947	1,671	1,527	7,390	2,482	7	1,066	283	364	736	1,901	414	19,146	4,564
DC	2,217	1,033	81	13	36	143	23	63	-	110	6	18	1	14	5	30	491
1ST	7,723	1,162	26	25	71	46	167	39	-	30	2	1	21	90	16	481	148
ME	501	168	1	2	7	6	17	-						3	1	125	6
MA	5,086	461	16	8	27	20	53	26		26	-	1	20	12	9	167	94
NH	516	176	3	3	5	7	9	6		3	2	-		23	-	101	12
RI	660	102		3	6	5	19			-	-	-	-	6	1	47	15
PR	958	235	6	9	26	8	69	3		1	-		1	46	4	41	21
2ND	28,086	3,490	167	37	182	87	490	61		64	10	19	56	186	113	1,628	481
CT	1,995	379	4	4	25	23	46	10		11			2	24	3	191	36
NY,N	1,758	456	22	1	24	2	45	1		-				21	3	328	9
NY,E	7,910	986	95	10	71	29	83	16	-	31	5	11	7	36	77	288	227
NY,S	11,362	923	17	4	33	25	166	28	-	12	3	8	11	49	25	366	176
NY,W	1,609	635	28	16	24	6	39	6		10	2		36	51	5	389	23
VT	262	111	1	2	5	2	21							4		66	10
3RD	26,106	3,496	153	136	129	118	470	440		238	28	21	196	81	27	1,162	297
DE	1,847	73	3		4	4	9		-		-	-	-	8	1	37	7
NJ	9,033	1,145	109	20	47	37	106	170	-	88	6	12	140	37	10	228	136
PA,E	9,830	858	10	17	47	31	190	19		4		5		2	7	419	107
PA,M	2,606	843	4	49	13	24	54	217		146	9	2	56	5	3	240	21
PA,W	2,573	547	27	36	17	21	106	34		-	13	2		25	4	237	23
VI	217	29		13	1	1	4		-	-	-	-	-	4	2	1	3
4TH	54,797	4,231	56	25	131	121	1,337	237	1	86	26	104	7	212	24	1,596	270
MD	4,223	827	13	12	36	36	233	4		10		37		80	2	259	106
NC,E	1,931	792	12	-	6	12	196	113		44	15	53	3	50	1	254	31
NC,M	1,132	314	2	-	4	6	163	15		2		-	-	23	2	91	6
NC,W	1,250	402	2	2	4	6	161	5		-	-	-	-	16	3	193	10
SC	4,792	678	5	3	16	2	227	1	1	4	2	-	-	14	6	370	25
VA,E	3,211	491	16	5	43	49	180	23	-	2	6	6	4	6	3	82	84
VA,W	1,193	337	2		6	3	109	22		11		5		14	2	154	9
WV,N	561	185	2		7	4	39	25		3		1		5	2	66	11
WV,S	36,414	225	2	3	7	3	29	29		10		2		4	1	126	9

Table C-3. (September 30, 2014—Continued)

Circuit and District	Private Cases															
										Prisoner Petitions						
	Total Private Civil Cases	Contract	Real Property	FELA[1]	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury[2]	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Intellectual Property	Labor Suits	All Other
TOTAL	290,367	26,141	6,856	296	1,158	3,890	69,923	3,363	33,747	16,703	168	30,871	586	13,402	18,299	28,326
DC	1,184	111	29		-	14	67	21	342	15	-	78	6	72	172	270
1ST	6,861	643	366	14	42	66	2,776	101	814	133	-	286	8	233	461	643
ME	333	58	7	1	3	5	50	5	102	13		31	-	9	27	22
MA	4,607	390	161	11	27	21	2,473	73	360	71		182	4	172	282	390
NH	340	41	47	-	1	5	38	9	62	24	-	36		15	17	45
RI	556	64	80		3	7	81	9	89	11	-	27		13	50	85
PR	723	70	71	2	8	18	133	5	201	14	-	10	1	24	65	101
2ND	21,896	3,296	237	96	68	386	2,966	324	4,696	664	-	2,234	16	968	2,836	2,872
CT	1,816	243	16	9	4	29	178	40	455	36		157	-	83	117	250
NY,N	1,302	97	11	5	3	16	96	13	337	144		387		30	64	100
NY,E	6,924	1,555	113	42	24	149	496	96	1,529	153	-	315	5	152	1,160	1,126
NY,S	10,429	1,265	86	40	33	167	1,994	152	2,141	220	-	1,092	12	660	1,409	1,136
NY,W	1,174	91	7			19	123	20	191	94	-	264	1	35	79	250
VT	151	25	3		1	5	19	4	42	7		19	-	8	7	10
3RD	22,611	3,476	244	51	30	576	4,307	374	3,444	1,866	20	2,228	19	2,091	1,336	2,860
DE	1,774	97	6	-	-	4	72	12	106	51	1	118	3	1,133	26	143
NJ	7,868	2,077	61	20	16	183	1,113	175	900	319	-	692	5	512	579	1,216
PA,E	8,972	859	62	26	5	277	2,873	118	1,432	842	14	833	6	349	436	1,036
PA,M	1,783	215	24	3	-	78	115	34	412	226	1	286	2	42	97	227
PA,W	2,026	197	35	-	4	27	104	31	546	323	4	299	1	55	191	209
VI	188	31	36	-	5	7	30	4	46	2	-	1		-	7	19
4TH	60,866	1,835	347	6	38	317	37,630	230	1,863	1,483	3	2,886	202	747	1,236	1,874
MD	3,396	433	108	2	7	134	247	73	449	148	-	486	139	283	443	444
NC,E	1,139	171	26	-	8	9	71	18	197	127	-	303	-	40	32	137
NC,M	616	78	12	1	-	7	33	13	150	143		259	3	32	33	54
NC,W	848	146	20	-	-	7	58	24	151	78	1	135	1	57	56	116
SC	4,114	408	32	1	14	60	1,510	35	353	376	1	746	22	51	318	187
VA,E	2,720	322	91	1	9	36	147	39	373	316	1	471	24	254	249	367
VA,W	856	79	24	1		24	58	11	70	148	-	316	2	15	37	71
WV,N	486	86	27	-	-	16	62	4	37	82		78	4	9	24	57
WV,S	36,189	112	7	-	1	24	35,644	13	73	52	-	66	7	6	43	121

Table C-3. (September 30, 2014—Continued)

Circuit and District	Total Civil Cases	U.S. Cases																
		Total U.S. Civil Cases	Contract	Real Property	Tort Action	Civil Rights	Prisoner Petitions						Habeas Corpus Alien Detainee	Forfeiture and Penalties	Labor Suits	Social Security	All Other
							Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other					
5TH	28,887	3,823	216	38	183	218	1,080	340	6	246	7	26	109	187	18	870	410
LA,E	2,801	222	16	6	36	17	39	2		-	-	1		1	1	67	32
LA,M	628	59	1		7		16	-		-	-			4		25	14
LA,W	3,016	327	1	4	25	4	46	91		26	2	5	44	3	2	58	16
MS,N	799	130	1	2	4	5	18	-		1	-			5		91	3
MS,S	1,843	209	6	7	15	22	48	6		4	4			12	4	64	17
TX,N	6,530	801	39	7	19	34	227	104		36	1	6	6	27	3	183	109
TX,E	4,119	479	8	2	6	17	104	71	4	32		4		25		172	34
TX,S	6,219	873	131	5	31	53	323	14	1	12		1	35	41	5	104	117
TX,W	3,403	813	11	3	40	66	257	52		135		9	24	39	3	106	68
6TH	22,381	4,806	394	286	92	114	670	90		81	23	9	28	200	41	2,353	249
KY,E	1,478	944	2	197	6	3	58	71		27	19	2		17	1	225	14
KY,W	1,533	206	2	46	7	11	40	-		1	-	-		4	1	69	24
MI,E	6,069	1,106	333	24	18	24	80	6		-	1	2	5	47	5	491	70
MI,W	1,844	343	3	3	6	7	58	3		2	2	-	6	3	4	231	13
OH,N	3,721	706	13	2	21	23	74	16		9	-	2	9	44	14	449	31
OH,S	3,476	691	12	6	18	23	54	1		3	-	2	3	35	11	470	53
TN,E	1,430	321	5	7	2	5	154			2	1			11	2	120	12
TN,M	2,867	281	4	7	4	11	44	2		6	-	-		13		179	11
TN,W	1,371	310	20	3	6	7	106	2		1	-	1		26	3	119	12
7TH	23,366	3,120	149	88	107	100	448	107		14	28	16	1	134	33	1,868	331
IL,N	10,396	1,104	123	18	69	48	130	9	-	6	9	13	-	28	17	406	231
IL,C	1,396	233	3	17	1	4	55	1	-	-	2	1		9		132	8
IL,S	2,983	293	2	26	14	5	83	82	-	5	4		-	6	2	89	13
IN,N	3,256	382	3	4	6	9	45	-	-	2	-	1	-	38	4	260	10
IN,S	2,868	575	12	10	11	16	93	5	-		16	-	-	11	3	382	17
WI,E	1,524	308	4	6	3	7	38	2	-		-	-	1	19	3	192	33
WI,W	905	225	2	7	3	12	24	6	-	1	-	-	-	21	4	124	19
8TH	16,620	3,866	39	67	79	94	846	127	1	37	38	13	3	96	26	2,234	173
AR,E	1,872	469	7	2	5	9	30	32		7	18	1		7	1	337	13
AR,W	1,176	507	3	4	7		33	2			1			6	1	444	6
IA,N	533	296		6		1	70	3	-	1				13	-	188	6
IA,S	541	213	1	4	2		78	6					-	4	2	109	7
MN	4,966	329	9	16	19	23	51	29	-	5			2	12	6	116	42
MO,E	2,879	504	4	4	6	49	97	10	-	13	1	3		14	2	276	24
MO,W	2,382	978	7	5	13	5	96	36	1	6	19	9	1	17	3	703	54
NE	640	132	4	6	10	2	44	2		-	-			17	4	31	12
ND	294	52	3	6	1	-	26			1	-	-	-	2		9	2
SD	318	86	1	3	14	5	21	5	-	2	-	-	-	3	1	23	8

Table C-3. (September 30, 2014—Continued)

Circuit and District	Private Cases															
										Prisoner Petitions						
	Total Private Civil Cases	Contract	Real Property	FELA[1]	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury[1]	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Intellectual Property	Labor Suits	All Other
6TH	**28,634**	**3,774**	**1,427**	**14**	**427**	**733**	**4,990**	**376**	**2,837**	**2,888**	**32**	**2,768**	**82**	**2,199**	**1,753**	**1,985**
LA,E	2,579	537	36	6	246	171	336	114	276	239		179	4	29	87	219
LA,M	759	99	8	-	18	54	126	18	145	60		184	2	8	21	36
LA,W	2,668	188	35	3	69	90	1,446	16	177	238		309	7	12	40	56
MS,N	669	90	11	-	3	37	130	8	144	95		90		8	23	32
MS,S	1,834	287	36	1	6	96	241	24	257	176	1	319	3	18	103	67
TX,N	6,729	586	448	-	-	57	2,062	62	406	670	11	503	28	170	388	448
TX,E	3,640	216	145	3	10	55	136	35	212	354	1	513	1	1,842	157	190
TX,S	5,348	1,324	406	1	77	106	374	66	525	541	14	372	2	168	672	692
TX,W	2,590	347	300		-	65	139	40	395	316	5	319	5	146	262	251
9TH	**17,775**	**1,889**	**483**	**23**	**49**	**323**	**3,048**	**222**	**2,788**	**1,841**	**13**	**2,884**	**19**	**833**	**1,843**	**2,099**
KY,E	834	136	10	3	1	44	125	19	106	104	1	93	3	10	76	103
KY,W	1,328	136	9	2	17	40	441	19	166	47	-	188	2	20	124	146
MI,E	3,964	566	228	2	15	53	192	53	529	534	-	276	2	209	391	774
MI,W	1,301	109	53	-	2	11	41	9	180	220	-	339	5	90	83	179
OH,N	3,016	251	39	1	4	39	946	57	423	246	1	144	3	186	300	345
OH,S	2,787	253	28	8	1	31	971	28	466	178	3	113	1	199	271	236
TN,E	1,109	118	25	7	1	37	121	12	268	74	4	177	1	42	81	141
TN,M	2,386	140	27		2	34	86	17	324	111	1	1,349		48	140	107
TN,W	1,061	118	34		6	34	123	8	207	127	3	216	2	29	97	58
7TH	**20,278**	**1,447**	**283**	**30**	**12**	**206**	**5,067**	**204**	**2,739**	**1,078**	**1**	**3,806**	**13**	**1,114**	**1,944**	**2,636**
IL,N	9,291	633	206	6	4	66	1,062	132	1,340	210		1,696	6	824	1,273	1,633
IL,C	1,162	72	22	1		9	70	6	218	54		533	1	6	61	89
IL,S	2,670	77	10	11	6	34	1,849	10	95	58	-	394	2	8	61	65
IN,N	2,876	111	7	7	1	41	1,842	10	326	161	-	149		22	66	111
IN,S	2,283	160	21	1		45	149	20	448	388	1	289		113	239	389
WI,E	1,316	108	10	3	-	8	52	12	190	167		267	3	81	129	286
WI,W	680	66	7	1	1	3	43	14	122	40		177	1	60	83	62
8TH	**11,964**	**1,448**	**197**	**20**	**11**	**188**	**3,462**	**172**	**1,438**	**711**	**3**	**1,881**	**12**	**718**	**781**	**1,178**
AR,E	1,403	122	10	5	4	39	71	11	197	192	-	600		6	75	71
AR,W	669	131	14	1		15	34	13	58	20	1	306		3	30	43
IA,N	247	40	1	1		4	25	2	44	21		48	-	9	23	29
IA,S	428	61	10	-		2	32	9	66	25		96	2	17	51	39
MN	4,656	409	82	1	4	16	2,386	45	390	87		81	-	577	196	413
MO,E	2,175	239	25	1	3	31	674	33	292	169	1	184	6	44	219	274
MO,W	1,404	248	49	5	-	30	152	32	191	121	-	203	2	34	141	196
NE	508	93	12	3	-	7	36	13	120	34	-	74		14	26	76
ND	242	69	20	3	-	6	32	11	24	15	-	18	-	4	17	23
SD	232	36	4			18	21	3	24	27	1	72	2	7	3	14

Table C-3. (September 30, 2014—Continued)

Circuit and District	Total Civil Cases	U.S. Cases															
		Total U.S. Civil Cases	Contract	Real Property	Tort Action	Civil Rights	Prisoner Petitions						Habeas Corpus Alien Detainee	Forfeiture and Penalties	Labor Suits	Social Security	All Other
							Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other					
9TH	**47,132**	**8,486**	**736**	**97**	**401**	**274**	**794**	**358**		**182**	**84**	**80**	**157**	**386**	**67**	**3,636**	**1,066**
AK	302	111	2	3	24	7	14		-		-	-	1	13	1	27	19
AZ	6,960	956	22	3	51	46	207	93		23	83	31	30	31	11	289	86
CA,N	5,900	539	17	6	50	24	37	5	-	3	1	1	15	23	13	180	164
CA,E	4,860	836	10	5	31	14	53	78	-	97	-	-	3	41	4	416	84
CA,C	14,567	2,798	641	28	86	81	137	142	-	21	-	8	18	96	19	1,112	411
CA,S	3,439	402	6	12	42	26	101	16	-	3	-	35	5	24	2	71	58
HI	710	82	5	1	12	13	9			2	-	1	2	4	2	4	27
ID	560	91	3	3	6	4	14		-			-	-	3	3	40	15
MT	795	154	3	14	12	2	50		-				-	4	2	38	29
NV	2,795	348	9	8	19	23	52	2	-	1			2	78	1	106	50
OR	2,170	636	1	5	20	7	36	1	-			2	2	41	5	466	50
WA,E	804	396	5	1	10	6	29	1						10	1	324	9
WA,W	3,199	1,105	10	8	38	20	55	16		2		1	79	20	3	752	91
GUAM	21	7	1		1	1		1		-	-	1		2	-		-
NMI	30	5	-		-	1	-	1		-				-	-		3
10TH	**10,367**	**2,296**	**49**	**99**	**83**	**66**	**273**	**40**		**9**	**24**	**7**	**13**	**158**	**16**	**1,289**	**193**
CO	3,668	448	11	8	13	11	39	2		2	1	1	9	43	8	256	44
KS	1,426	482		37	10	3	89	32	-	3	23	4	-	35	4	200	12
NM	1,211	322	5	3	25	16	39		-		-	1	2	53	2	138	36
OK,N	796	265	5	21	2	6	28		-		-	-	1	5	-	187	10
OK,E	562	278	2	10	5	3	8	1	-		-	-		1	-	242	8
OK,W	1,430	293	9	16	14	9	27	1	-	2		1		7	-	172	35
UT	1,120	198	17	2	13	13	22	1	-	2			-	12	1	74	41
WY	264	40	-	2	1	2	21	3		-			-	2	-		9
11TH	**31,026**	**5,886**	**361**	**38**	**178**	**147**	**1,183**	**671**	**-**	**68**	**27**	**61**	**148**	**189**	**36**	**2,124**	**464**
AL,N	2,466	581	4	6	12	14	68	51		6	3	-	75	20	2	292	28
AL,M	1,253	177	2	-	16	4	34	6		1	1	-		13		88	12
AL,S	844	138	1	1	-	4	43	1	-	-	-	-	-	2	1	77	8
FL,N	1,869	369	5	3	16	22	103	39	-	-	12	-	17	34	4	106	8
FL,M	8,497	1,906	109	6	67	34	342	253		36	6	8	2	21	10	856	157
FL,S	8,704	1,138	201	14	24	32	360	93	-	3	-	11	4	30	8	176	162
GA,N	5,142	722	21	6	30	22	89	65	-	11	-	31	2	38	7	329	71
GA,M	1,312	249	3		2	7	41	3	-	1	1		47	16	2	121	6
GA,S	1,077	283	5		11	8	83	60	-		2	1	1	18	2	80	16

Table C-3. (September 30, 2014—Continued)

Circuit and District	Private Cases															
										Prisoner Petitions						
	Total Private Civil Cases	Contract	Real Property	FELA[1]	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury[2]	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Intellectual Property	Labor Suits	All Other
9TH	**38,666**	**3,899**	**1,987**	**16**	**106**	**214**	**2,761**	**787**	**6,477**	**3,834**	**30**	**8,043**	**103**	**2,698**	**2,813**	**6,196**
AK	191	33	1	-	11	4	27	1	33	15	-	29		1	15	21
AZ	6,004	336	87	-	2	19	144	35	396	300	14	3,903	2	113	236	413
CA,N	5,361	526	284		15	13	334	116	880	522	4	842	12	456	528	826
CA,E	4,044	237	161	3	1	13	210	33	994	706	1	1,106	13	56	137	374
CA,C	11,789	1,189	976	1	15	44	742	312	2,406	1,366	6	463	8	1,482	880	1,878
CA,S	3,037	230	106		2	7	628	53	378	259	-	410	2	212	139	609
HI	628	93	35		19	6	88	99	134	13	-	43		26	26	44
ID	469	74	13	3		9	29	4	89	56	1	101		14	16	61
MT	641	105	12	1		9	59	9	50	70		256	2	6	27	36
NV	2,447	396	127			50	204	44	396	310		337	15	116	82	367
OR	1,534	216	40	3	6	23	114	28	324	152	3	186	46	85	135	173
WA,E	406	50	15	2		2	28	5	71	35		116	2	11	15	56
WA,W	2,094	390	128	3	37	14	149	56	312	126	1	253	1	109	271	244
GUAM	14	5					3		1	2	-			-	1	2
NMI	25	6				1	2		10	1	-			-	3	2
10TH	**8,871**	**1,326**	**129**	**12**	**2**	**220**	**748**	**163**	**1,670**	**731**	**4**	**994**	**22**	**864**	**439**	**1,167**
CO	3,120	432	34	4	1	42	257	32	422	327		406	2	354	156	539
KS	974	156	12	2	1	39	86	37	210	83	-	105	9	28	76	149
NM	889	114	18	2		28	86	20	311	46		144		6	37	76
OK,N	531	83	5	-	-	26	41	11	135	72	1	40	2	11	45	59
OK,E	274	43	1	-	-	14	23	7	77	37	-	34	1	3	10	24
OK,W	1,137	251	12	1	-	39	106	26	253	144	3	187	7	16	34	79
UT	922	207	36	-	-	16	99	12	136	27	-	82	-	131	73	122
WY	224	40	9	3	-	17	53	6	26	15		24	1	3	6	19
11TH	**26,461**	**3,007**	**1,167**	**13**	**373**	**377**	**1,878**	**380**	**8,083**	**2,180**	**52**	**3,338**	**116**	**1,178**	**3,298**	**2,977**
AL,N	1,917	242	31	3	-	43	181	17	571	117	5	380	2	28	170	157
AL,M	1,106	98	2	-	-	35	66	6	212	89	5	470	22	6	25	68
AL,S	508	106	15	-	6	13	41	6	83	58	1	83	-	6	17	69
FL,N	1,500	122	41	1	6	23	82	10	481	220		338	8	13	126	49
FL,M	6,589	787	130	2	28	106	361	69	994	820	29	819	29	425	1,032	976
FL,S	7,566	989	127		327	22	464	171	1,816	388	4	312	12	506	1,433	993
GA,N	4,420	490	765	5	1	91	511	78	524	255	6	424	32	170	366	552
GA,M	1,063	86	15	1	-	24	230	10	159	131	2	287	6	16	46	51
GA,S	794	106	11	1	5	20	59	11	141	74	-	256	4	6	41	60

[1] FELA = Federal Employers Liability Act.
[2] Includes cases filed in previous years as consolidated cases that thereafter were severed into individual cases.

No. 15-339

In The
Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Relevant Docket Entries for the United States

U.S. District Court
District of Maryland (Greenbelt)
CIVIL DOCKET FOR CASE #: 8:09-cv-02367-AW

Blake v. Maynard et al

Date Filed	#	Docket Text
09/08/2009	1	COMPLAINT against Gary Maynard, Michael Stouffer, Micheal Ross, James Madigan, The Dept. of Corrections, State of Maryland, M.R.D.C.C., filed by Shaidon Blake. (Attachments: # 1 envelope)(bmh, Deputy Clerk) (Entered: 09/10/2009)
09/22/2009	3	ORDER dismissing claims against the Department of Corrections, State of Maryland, and MRDCC; directing the Plaintiff to forward $8.33 to the Clerk within 20 days as the initial partial filing fee and to make monthly payments on the remainder filing fee; granting 2 Plaintiff's Motion for Leave to Proceed in forma pauperis; directing Clerk to mail copies and withhold service; and directing Defendants to answer the complaint. Signed by Judge Alexander Williams, Jr on 9/22/09. (Attachments: # 1 service letters) (bmh, Deputy Clerk)(c/m 9/23/09) (Entered: 09/23/2009)
11/19/2009	6	ANSWER to 1 Complaint by Gary Maynard, Michael Stouffer, Micheal Ross, The Dept. of Corrections,

		State of Maryland, M.R.D.C.C.. (Attachments: # 1 Election for Jury Trial)(Bell, Glenn) (Entered: 11/19/2009)
09/09/2010	33	ORDER denying 16 Plaintiff's Motion to Compel; denying 17 Plaintiff's Motion for Summary Judgment without prejudice; granting 18 Defendants' Motion to Dismiss and denying as to Defendant Ross; and directing Clerk to appoint Counsel. Signed by Judge Alexander Williams, Jr on 9/9/10. (apl, Deputy Clerk)(c/m 9/20/10). (Entered: 09/10/2010)
11/17/2010	38	ORDER appointing Jay S. Brown as pro bono counsel to represent Plaintiff. Signed by Judge Alexander Williams, Jr on 11/16/2010. (kn, Deputy Clerk)(c/m 11/17/10)(c/m docket sheet, complaint, reimbursement form on 11/18/2010) (Russell, M). (Entered: 11/17/2010)
01/25/2011	49	ORDER DENYING 27 Plaintiff Shaidon Blake's Motion for Default Judgment on Defendant James Madigan and ORDERING Plaintiff to serve process upon Defendant James Madigan within **30 days** of this Order. Signed by Judge Alexander Williams, Jr on 1/24/2011. (kn, Deputy Clerk) (Entered: 01/25/2011)

03/14/2011	53	ANSWER to Complaint by James Madigan.(Sachse, Douglas) (Entered: 03/14/2011)
08/02/2011	66	Consent MOTION to Amend/Correct 6 Answer to Complaint by Micheal Ross. Responses due by 8/19/2011 (Attachments: # 1 Amended Answer, # 2 Comparison Amended Answer, #3 Text of Proposed Order)(Rice, Sarah) (Entered: (08/02/2011)
08/19/2011	73	ORDER GRANTING 71 Defendant Michael Ross's Motion to Amend This Court's Order of August 12, 2011. Signed by Judge Alexander Williams, Jr on 8/19/2011. (kns, Deputy Clerk) (Entered: 08/19/2011)
08/23/2011	74	MOTION to Strike *Certain of Defendant Ross's Affirmative Defenses* by Shaidon Blake. Responses due by 9/9/2011 (Attachments: # 1 Affidavit Claffee Declaration in Support of Motion to Strike)(Claffee, Scott) (Entered: 08/23/2011)
09/06/2011	75	RESPONSE in Opposition re 74 MOTION to Strike *Certain of Defendant Ross's Affirmative Defenses* filed by Micheal Ross. Replies due by 9/23/2011. (Attachments: # 1 Exhibit One, Electronic Correpondence of Counsel)(Rice, Sarah) (Entered: 09/06/2011)
09/22/2011	78	Consent MOTION to Amend/Correct 1 Complaint by Shaidon Blake.

		Responses due by 10/11/2011 (Attachments: #1 Plaintiff's Amended Complaint)(Eisenberg, Emily) (Entered: 09/22/2011)
09/27/2011	81	PAPERLESS ORDER granting 78 Motion to Amend/Correct. Signed by Judge Alexander Williams, Jr. on September 27, 2011. (vj, Chambers) (Entered: 09/27/2011)
10/06/2011	84	ANSWER to Complaint *(Amended)* by Micheal Ross.(Rice, Sarah) (Entered: 10/06/2011)
10/24/2011	87	MOTION to Strike Defendant Ross's Fifth Affirmative Defense by Shaidon Blake. Responses due by 11/10/2011 (Claffee, Scott) (Entered: 10/24/2011)
01/09/2012	94	MOTION for Summary Judgment by Micheal Ross. Responses due by 1/26/2012 (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1 2011 Medical Records, # 3 Exhibit 2 Blake Deposition, # 4 Exhibit 3 Inmate Handbook Receipt Forms, # 5 Exhibit 4 Disciplinary Hearing Record, # 6 Exhibit 5 Ross Deposition, # 7 Exhibit 6 Madigan Deposition, # 8 Exhibit 7 Woodard Deposition, # 9 Exhibit 8 IIU Report, # 10 Exhibit 9 Inmate Handbook, # 11 Exhibit 10 DCD 185-002, # 12 Exhibit 11 DCD 185-003, # 13 Exhibit 12 Martiin Expert

		Report)(Rice, Sarah) Modified on 1/13/2012 (kns, Deputy Clerk)(Hard Copy rec'd 1/10/12). (Entered: 01/09/2012)
02/02/2012	96	RESPONSE in Opposition re 94 MOTION for Summary Judgment filed by Shaidon Blake. Replies due by 2/21/2012. (Attachments: # 1 Affidavit Declaration of Scott A. Claffee)(Claffee, Scott) (Entered: 02/02/2012)
05/10/2012	99	MEMORANDUM OPINION. Signed by Judge Alexander Williams, Jr on 5/10/2012. (kns, Deputy Clerk) (Entered: 05/10/2012)
05/10/2012	100	ORDER DENYING 87 Plaintiff's Motion to Strike; GRANTING 94 Defendant Ross's Motion for Summary Judgment and directing that the Clerk CLOSE the case. Signed by Judge Alexander Williams, Jr on 5/10/2012. (kns, Deputy Clerk) (Entered: 05/10/2012)
06/04/2012	101	MOTION for Reconsideration re 99 Memorandum Opinion, 100 Order on Motion to Strike, Order on Motion for Summary Judgment by Shaidon Blake. Responses due by 6/21/2012 (Claffee, Scott) (Entered: 06/04/2012)
10/16/2012	102	MEMORANDUM/ORDER scheduling a hearing on November 2, 2012 at 4:00 p.m. in Courtroom 4A,

		Greenbelt regarding 101 MOTION for Reconsideration re 99 Memorandum Opinion, 100 Order on Motion to Strike, Order on Motion for Summary Judgment filed by Shaidon Blake. Signed by Judge Alexander Williams, Jr on 10/15/2012. (kns, Deputy Clerk) (Entered: 10/16/2012)
11/02/2012	108	Motion Hearing held on 11/2/2012 re 101 MOTION for Reconsideration re 99 Memorandum Opinion, 100 Order on Motion to Strike, Order on Motion for Summary Judgment filed by Shaidon Blake before Judge Alexander Williams, Jr. (Court Reporter: Williams (4A) (esp, Deputy Clerk) (Entered: 11/02/2012)
11/14/2012	110	MEMORANDUM OPINION. Signed by Judge Alexander Williams, Jr on 11/14/2012. (kns, Deputy Clerk) (Entered: 11/14/2012)
02/28/2013	136	ORDER OF JUDGMENT in favor of Plaintiff Shaidon Blake against Defendant James Madigan in the amount of $50,000.00 (Fifty thousand dollars and no cents) for compensatory damages, with costs. Signed by Judge Alexander Williams, Jr on 2/27/2013. (kns, Deputy Clerk)(.17%) (Entered: 02/28/2013)
07/11/2013	147	ORDER GRANTING 138 Plaintiff's Motion for Attorney Fees and

		DENYING 139 Defendant Madigan's Motion for New Trial or, in the Alternative, to Alter or Amend the Judgment. Signed by Judge Alexander Williams, Jr on 7/10/2013. (kns, Deputy Clerk) Modified text on 7/11/2013 (kns, Deputy Clerk). (Entered: 07/11/2013)
08/09/2013	149	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 148 Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to http://www.ca4.uscourts.gov and click on Forms &Notices. (rss, Deputy Clerk) (Entered: 08/09/2013)

Relevant Docket Entries for the United States Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 13-7279

Shaidon Blake v. Michael Ross, Sgt.

08/09/2013	1	Case docketed. Originating case number: 8:09-cv-02367-AW. Case manager: DLett. [13-7279] (DL)
1/27/2015	45	ORAL ARGUMENT heard before the Honorable William B. Traxler, Jr., Roger L. Gregory and G. Steven Agee. Attorneys arguing case: Scott Matthew Noveck for Appellant Shaidon Blake and Ms. Sarah W. Rice for Appellee Micheal Ross. Courtroom Deputy: Sarah Carmichael. [999518234] [13-7279] (SAC)
5/21/2015	49	PUBLISHED AUTHORED OPINION filed. Originating case number: 8:09-cv-02367-AW. Annotation added 1 to opinion reflecting Supreme Court history. – [Edited 01/05/2016 by SJC] (DL)
5/21/2015	50	JUDGMENT ORDER filed. Disposition method: 13-7279 opn.p.arg. Decision: Reversed and remanded. Originating case number: 8:09-cv-02367-AW. Entered on Docket Date: 05/21/2015. [999587652] Copies to all parties and the district court/agency.. [13-7279] (DL)

6/04/2015	54	Corrected PETITION for rehearing en banc (FRAP 35) by Appellee Micheal Ross. [13-7279] – [Edited 06/04/2015 by CH] Stephanie Lane-Weber
6/16/2015	55	COURT ORDER filed [999602849] denying Motion for rehearing en banc [54]; terminating Motion for rehearing en banc *[52]* Copies to all parties.. [13-7279] (CH)

FORM TO BE USED BY A PRISONER FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Shaidon Blake AKA Shamvoy Smith
343938 – 1A31 NBCI
14100 McMullen Hwy. SW
Cumberland, MD. 21502
(Full name, prison identification number and address of the plaintiff)

v.

Civil Action No. AW-09-2367
(Leave blank. To be filled in by Court.)

(See Attached)
(Full name and address of the defendant(s))

COMPLAINT

(Filed Sep. 8, 2009)

I. Previous lawsuits

A. Have you filed other cases in state or federal court dealing with the same facts as in this case or against the same defendants?

YES [ ] NO [✓]

B. If you answered YES, describe that case(s) in the spaces below.

1. Parties to the other case(s):

   Plaintiff: NA

   Defendant(s): NA

Complaint Under The Civil Rights Act,
42 U.S.C. § 1983
In The United States District Court
For The District of Maryland

Shaidon Blake
343938 – 1A31/NBCI
14100 McMullen Hwy SW
Cumberland, MD. 21502
(Plaintiff)

v. Civil Action No. _____

Sec. Gary Maynard 300 E. Joppa Rd #1000 Towson MD.
Comm. Michael Stouffer 6776 Reisterstown Rd #310
Balt. MD
Sgt. Michael Ross 550 E. Madison St. Balt. MD.
James Madigan 550 E. Madison St. Balt. MD.
The Dept. of Corrections 6776 Reisterstown Rd #317
Balt. MD.
State of Maryland Capital Building, Annapolis, MD
M.R.D.CC 550 E. Madison St. Balt. MD.

2. Court (if a federal court name the district; if a state court name the city or county): NA

3. Case No.: NA

4. Date filed: NA

5. Name of judge that handled the case: NA

6. Disposition (won, dismissed, still pending, on appeal): NA

7. Date of disposition: NA

II. Administrative proceedings

A. If you are in a Division of Correction facility, did you file an administrative remedy procedure request under DCD 185-001, *et seq.*?

YES [✓] NO [ ]

1. If you answered YES:

   a. What was the result? After an investigation the defendant James Madigan was fired from M.R.D.C.C.

   b. Did you appeal to the Commissioner?

   YES [ ] NO [✓]

2. If you answered NO to either of the questions above, explain why you did not file an administrative remedy procedure request or an appeal to the Commissioner. The warden appropriately dismissed the defendant from his job as a lieutenant at M.R.D.C.C.

3. Did you file any other type of administrative complaint such as an appeal to the warden of an adjustment decision or a decision to withhold mail, a complaint to the Sundry Claims Board, etc.?

YES [ ] NO [✓] NA

4. If you answered YES, explain what you filed and what was the result. NA

B. If you are *not* in a Division of Correction facility, is there a grievance procedure at your institution?

YES [ ] NO [ ] NA

If your answer is YES:

1. Did you file a grievance?

   YES [ ] NO [ ] NA

2. If you filed a grievance what was the result? NA

3. If you did not file a grievance explain why not? NA

III. Statement of claim

(Briefly state the facts of your case. Include dates, times, and places. Describe what each defendant did or how he/she is involved. If you are making a number of related claims, number and explain each claim in a separate paragraph.) (See attached) pg. 6

IV. Relief

(State briefly what you want the Court to do for you) (See attached) pg. 8

SIGNED THIS 7 day of September, 2009.

Shaidon Blake
(original signature of plaintiff)
343 938 – 1A 31 NBCI
14100 McMullen Hwy SW
Cumberland, MD. 21502
(address of Plaintiff)

III. Statement of Case

On 6-21-07 at 6:50 pm while I was being escorted from unit 7e at the MRDCC (Diagnostic & Classification Center) by Sgt. Michael Ross I was approached by Lt. James Madigan who once I was handcuffed behind my back proceeded to push me. I was headed down on flight of stairs at the time. His actions were unprovoked so I stated he didn't have to push me. Once outside of the unit Lt. Madigan returned inside to speak with Teir Officer Cpl. Candice Fields and I was ordered to stand with my right shoulder against the wall until Lt. Madigan returned. I was being watched by Sgt. Ross and I complied with the order. After Lt. Madigan exited the unit he approached me and without warning or being provoked in any way by me started to punch me in the face. Lt. Madigan had a circle key ring gripped in his hands as he pounded me in the left side of my face from over head approximately 7 times. His force drove my head into the wall several times. After his unprovoked attack he then proceeded to try and throw me to the ground yelling for me to take a knee. St. Ross made no attempts to stop the attack but the office assigned to

the hall called for officers assistance. Capt. Vincent was one of the first to respond and separated Lt. Madigan and Sgt. Ross from me then I was escorted to medical by Captain Vincent.

I am in state custody and it was a unprovoked attack in which I now live with the result. Therefore I am now seeking to hold the Department of Corrections, the State of Maryland, Secretary Gary D. Maynard, Commissioner Michael Stouffer, M.R.D.C.C., Sgt. Michael Ross and James Madigan responsible for my injuries.

The State of Maryland, Sec. Maynard, Comm. Stouffer and M.R.D.C.C. had a volitile and unstable employee working and my injuries and assault are the results of improper job screening and oversight which is neglegence.

Sgt. M. Ross was responsible to protect me from attack and injury because he was my escort and because I was handcuffed behind my back I was rendered defenseless. I am psycologically damaged and physically and therefore I am under permanent doctors care taking medication.

IV. Relief

I Sheldon Blake am seeking compensation for pain & suffering along with extensive medical treatment in the amount of 1 million dollars ($1,000,000.00) and any other relief this court deems proper.

I now suffer from P.T.S.D. and constantly relive my attack which interferes with my ability to interact with officers. I find it hard to trust any officers and do not like being handcuffed for fear of attack. I am on administrative segregation because my anxiety attacks won't allow me to function properly in general population. I am under the psychiatrist's care and have to take medication twice daily for my condition.

This attack has worsened a injury I had in my head and face. I suffer from permanate nerve damage on my left side of my face and severe migranes which I take 600 miligrams of Neurontin for the pain.

Psychiatrist has prescribed 50mg Diphenhydramine Hcl twice a day. 5mg Perphenazine twice a day and 60mg of Prozac once a day. These medications are to treat anxiety attacks, depression, and P.T.S.D.

[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938	*	
Plaintiff,	*	Civil No. AW-09-2367
v.	*	
GARY MAYNARD, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

ANSWER

(Filed Nov. 19, 2009)

Defendants, Gary Maynard, J. Michael Stouffer, Department Of Corrections, State Of Maryland, MRDCC and Michael Ross, by their attorneys, Douglas F. Gansler, Attorney General of Maryland, and Glenn W. Bell, Assistant Attorney General, in answer to the complaint state:

1. Defendants deny each and every allegation set forth in the complaint. And in further answer to the complaint, Defendants state:

2. Defendants' actions were performed in a reasonable good faith belief that their actions were proper.

3. Defendants' actions were performed in good faith reliance on standard operating procedures.

4. The complaint does not state a claim upon which the relief prayed can be granted.

5. Each and every act and action of the Defendants taken with respect to the Plaintiff was done and performed in good faith, in the official discharge of their duties as employees of the Division of Correction, and with a reasonable belief as to the constitutionality of their actions for which they enjoy a qualified immunity from liability.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

/s/
GLENN W. BELL
Assistant Attorney General
Federal Bar No.00051

St. Paul Plaza – 19th Floor
200 St. Paul Place
Baltimore, Maryland 21202
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH	*	
	*	
Plaintiff	*	Civil Action No.
v	*	AW-09-2367
GARY MAYNARD, *et al.*	*	
	*	
Defendants	*	
	***	

MEMORANDUM

(Filed Sep. 9, 2010)

Pending is Plaintiff's Motion for Summary Judgment and Defendants' Motion to Dismiss or for Summary Judgment. Paper No. 17 and 18. Also pending is Plaintiff's Motion to Compel Discovery and Defendant Consolidation.[1] Paper No. 16. Plaintiff has opposed Defendants' Motion to Dismiss or for Summary Judgment. Paper No. 26. Upon review of the papers filed, the Court finds a hearing in this

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[1] Plaintiff states in his Motion to Compel that counsel has not complied with his requests for production of documents. Paper No. 16. It appears that in the interim counsel did provide the documents Plaintiff requested, as stated in Defendants' opposition to the motion to compel. Paper No. 19. Plaintiff has filed the requested documents as exhibits to his Response in Opposition. Paper No. 26. Thus, his Motion to Compel shall be denied.

matter unnecessary. *See* Local Rule 105.6 (D. Md. 2010).

Background

On June 21, 2007, Plaintiff was incarcerated at the Maryland Reception Diagnostic and Classification Center (MRDCC) and was being escorted while handcuffed from Unit 7C by Sergeant Michael Ross when he was approached by Lieutenant James Madigan. Paper No. 1 at p. 6. Plaintiff claims Madigan pushed him while he was walking down a flight of stairs. *Id.* Plaintiff states he told Madigan he did not have to push him since his actions were unprovoked. *Id.*

Madigan left Plaintiff in the hallway, instructing him to stand with his right shoulder against the wall, while Madigan went into another room to speak to Corporal Candice Fields, the tier officer. Plaintiff explains that he was being watched by Ross and that he complied with the order given by Madigan. He claims Madigan left the office, walked over to Plaintiff, and began punching him in the face without warning or provocation. Plaintiff states Madigan had a circular key ring gripped in his hands while he "pounded me in the left side of my face from over head approximately 7 times." *Id.* at p. 6. Plaintiff states the force of the blows drove his head into the wall several times and Ross never made any attempt to intervene on Plaintiff's behalf. After Madigan stopped punching Plaintiff he began yelling at him to

"take a knee" while attempting to throw Plaintiff to the ground. Plaintiff claims that a correctional officer assigned to a post in the hallway called for assistance during the assault and Captain Vincent responded to the call. Vincent separated Madigan and Ross from Plaintiff and escorted Plaintiff to the medical unit. *Id.* As a result of the assault Plaintiff states he suffers from psychological damage as well as permanent physical injuries for which he receives medical care. *Id.* at p. 7.

Defendants do not deny Madigan struck Plaintiff. Paper No. 18. The tier officer, Candis Fields, prepared an incident report describing the events, stating in relevant part:

> Upon beginning top tier evening recreation and phone list, inmate Blake, Shidon turned off the pod's television and stated, "which one of you told her to run a phone list? We run our own phone list up here. We men." Inmate Blake then stated to me 'you need to fall back and let us run this. We can run our own phone list.' I then stated to inmate Blake 'as the pod officer I will run a phone list to ensure that everyone gets a fair turn on the phone.' Inmate Blake then stated to another inmate 'she goin cause somebody to get hurt.' I then informed Sgt. Michael Ross and Lt. James Madigan of my observations and inmate's statements. At 7:15 p (sic) Sgt. Michael Ross and Sgt. lawn Davis entered 7 Charlie and secured inmate Blake into his cell without force

or incident. At 8:10 p Lt. James Madigan called 7 Charlie and I requested that inmate Blake be moved off of unit 7 Charlie due to several inmates stating that inmate does not allow others to use the telephone unless he approves. Inmates also stated that Blake intimidates other inmates by stating that he's head of the Bloods. Lt. Madigan then stated to me 'well the only way he'll be moved is if you write a ticket on him with charges 100, 104, 312, [and] 405: I then proceeded to write a notice of infraction with these listed charges to ensure that inmate Blake was no longer a threat or concern to other housed inmates. At 9:40 p, Lt. Madigan came onto 7 Charlie along with Sgt. Michael Ross and requested my handcuffs. I then handed him the handcuffs and we all proceeded to cell 7122. Lt. Madigan then ordered Blake to 'pack up.' Inmate then inquired 'why?' Lt. Madigan stated 'you're Mr. Tough Guy trying to take over a unit. Let's go.' Inmate then packed up his things and I handed Lt. Madigan my podset keys #241 and proceeded to the officer's level of the unit. Lt. Madigan and Sgt. Ross then secured inmate by means of handcuffs and proceeded down the steps. Inmate Blake began to be slowful (sic) coming down the steps being escorted by Sgt. Ross when Lt. **Madigan began to shove inmate in a forceful way down the steps**. Inmate Blake began to shout obsene (sic) remarks to Lt. Madigan. Inmate continued these remarks until reaching the threshold of 7 Charlie where Lt.

> **Madigan with keyset #241 in a closed fist struck inmate Blake . repeatedly on the right side of his jaw with his right hand**. Inmate Blake then became very agitated stating 'let me go, you hit me in my fucking mouth. Take these cuffs off.' Inmated stated this statement repeatedly with Sgt. Ross trying to remain in control of inmate. At 9:55 p, Cpl Latia Woodard assigned to 7 Corridor made a radio transmission 'signal 13, 7 corridor' due to Sgt. Ross and Lt. Madigan unable to gain control of inmate Blake.

Paper No. 18 at Ex. 1, pp. 18-21 (emphasis supplied). Other reports written by Latia Woodard and Sgt. Ross verify that Madigan struck Plaintiff, but do not confirm Madigan did so with the keyset clenched in his fist. *Id.* at pp. 17, 22-27 Woodard's report adds that she attempted to intervene by telling Madigan to let Plaintiff go, to no avail. *Id.* at p. 17 In addition she states Madigan told her to mace Plaintiff after he had punched Plaintiff in the jaw several times and they were walking toward the elevator. *Id.* Woodard states that she did not comply with the request to mace Plaintiff and instead called a signal 13 as requested by Sgt. Ross. *Id.*

Ross's report verifies that Plaintiff was not resistant to being escorted from his cell, but he did not want Madigan to touch him and repeatedly made moves in an attempt to get Madigan to let go of him. *Id.* at pp. 23-26. Additionally, it is clear from Ross's report that at no time was Madigan's intervention

necessary as Plaintiff was not resistant to being escorted by Ross. Ross verifies that Madigan pushed Plaintiff while he was on the stairs and that he hit Plaintiff repeatedly in the face. *Id.* Ross states under oath that when Madigan asked Woodard to mace Plaintiff, he told Woodard to call for assistance and told Plaintiff he was taking him to the floor. *Id.* at Ex. 2. Ross explains that Plaintiff agreed to go down to the floor but when he tried to pull Plaintiff to the floor their feet became entangled and Ross, Madigan and Plaintiff fell to the floor. *Id.* It was during this fall that Ross sustained contusions to his knees. *Id.*

Madigan claims he grabbed Plaintiff's right arm because he was trying to break free from Ross's grasp. Paper No. 18 at Ex. 1, p. 5. He further claims that Plaintiff "increased his resistance, shaking his body fiercely, causing us to lose our grasp" and that Plaintiff "lunged forward at me with his upper body." *Id.* Madigan then admits striking Plaintiff's face four times for purposes of gaining control over him and because he felt his safety was in jeopardy. The report from Madigan neglects to mention the request for mace[2] and simply recalls that Woodard called a signal 13. *Id.* Defendants uniformly claim that Plaintiff was taken to the medical unit where he declined treatment.

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[2] Madigan admitted to requesting Woodard to mace Plaintiff when he was interviewed for an internal investigation report after he had resigned his position. Paper No. 26 at Ex. E, p. 3.

An investigation into the use of force was conducted and Captain Vincent found that:

> Though Lt. James Madigan wrote in his report that he feared for his safety, I conclude that the risk to his safety was negligible at best. I further conclude that the situation was escalated by Lt. Madigan's rigidness not to heed the request, then demand, of the inmate as well as Sergeant Michael Ross's comment that he, Sgt. Ross, had the inmate under control. In short, the event could have been avoided. Therefore, I recommend that Lt. James Madigan receive fifteen days suspension or forfeiture of the 120 hours of annual leave and/or mandatory use of force training.

Paper No. 18 at Ex. 1, p. 4. Vincent's findings were confirmed by both the Security Chief and the Warden who found the use of force was unnecessary and therefore excessive. *Id.* at p. 30. Madigan later signed a Disciplinary Action Settlement Agreement which required his resignation effective July 13, 2007 Paper No. 26 at Ex. A.

Standard of Review

Summary Judgment is governed by Fed. R. Civ. P. 56(c) which provides that:

> [Summary judgment] should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any

> material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has clarified that this does not mean that any factual dispute will defeat the motion:

> By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 247-48 (1986) (emphasis in original).

The party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of [his] pleadings but rather must set forth specific facts showing that there is a genuine issue for trial. *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir. 2003) (alteration in original) (quoting Fed. R. Civ. P. 56(e)). The court should view the evidence in the light most favorable to the nonmovant, and draw all inferences in her favor without weighing the evidence or assessing the witness's credibility. *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 644-45 (4th Cir. 2002). The court must, however, also abide by the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial. *Bouchat*, 346 F.3d at 526 (internal

quotation marks omitted) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993), and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 240 (4th Cir. 1988).

Analysis

Whether force used by prison officials was excessive is determined by inquiring if force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. *Hudson v. McMillian*, 503 U. S. 1, 6-7 (1992). This court must look at the need for application of force; the relationship between that need and the amount of force applied; the extent of the injury inflicted; the extent of the threat to the safety of staff and inmates as reasonably perceived by prison officials; and any efforts made to temper the severity of the response. *See Whitley v. Albers*, 475 U. S. 312, 321 (1986). The absence of significant injury alone is not dispositive of a claim of excessive force. *Wilkens v. Gaddy*, ___ U.S. ___, 130 S. Ct. 1175 (2010). The extent of injury incurred is one factor indicative of whether or not the force used was necessary in a particular situation, but if force is applied maliciously and sadistically liability is not avoided simply because the prisoner had the good fortune to escape serious harm. *Id.*

The undisputed evidence establishes that the force used against Plaintiff by Madigan was excessive and unnecessary. Disciplinary action was taken against Madigan resulting in his removal from employment with the Department of Public Safety and Correctional Services. In addition, Plaintiff submits medical records from July 2007 to January 2010 which indicate he suffered nerve damage to his face, causing headaches for which he is prescribed neurontin. Paper No. 26 at Ex. S-KK. Defendants have not presented evidence to refute the medical records submitted by Plaintiff; thus, it is undisputed that he suffered serious harm as a result of the force used.

The question remains, who is responsible for Plaintiff's injuries? Defendants suggest they are entitled to avail themselves of a qualified immunity defense because they did not violate any clearly established legal rule. Paper No. 18. When considering whether a defendant is entitled to avail himself of a qualified immunity defense, this Court must consider whether, at the time of the claimed violation, this right was clearly established and "whether a reasonable person in the official's position would have known that his conduct would violate that right." *Rish v. Johnson*, 131 F. 3d 1092, 1095 (4th Cir. 1997) *citation omitted.* In this case Plaintiff was restrained, at least partially cooperative, and he was punched in the face at least four times. A reasonable person would have known that the conduct in question was unlawful. Indeed, other officers who witnessed the events did not view Madigan's conduct as reasonable

under the circumstances. A qualified immunity defense is unavailable in this case.

It is easily concluded that Madigan was responsible for the excessive force used against Plaintiff, however, Madigan has never been served with the Complaint. Recent attempts to serve Madigan at his last known home address failed; the summons was returned unexecuted, marked "return to sender unable to forward." Paper No. 29. Thus, Madigan has not had the opportunity to defend against the Complaint and judgment may not be entered against him in the procedural posture of this case.[3]

Plaintiff assigns blame to Ross for failing to intervene on his behalf when Madigan was assaulting him. Paper No. 1 and 26. Defendants allege that to the extent Ross failed to intervene on Plaintiff's behalf, such failure is simply negligence and does not state a constitutional claim. It is clear from the evidence submitted by both parties that Ross was in the best position of any other officers on the scene to determine whether Plaintiff's conduct required a use of force against him. According to his statement, Ross told Madigan that he had control of Plaintiff, seemingly to discourage Madigan from his continued efforts to grab Plaintiff. In addition, Ross told Woodard to radio for help and attempted to get Plaintiff to the floor. Whether Ross's actions were sufficient

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[3] Plaintiff's Motion for Default Judgment (Paper No. 27) must, therefore, be denied.

in light of the circumstances is a genuine dispute of material fact precluding summary judgment as to the claims against Ross.

Defendants Maynard and Stouffer are supervisory officials against whom no allegations of direct involvement or wrongdoing has been claimed. Liability of supervisory officials "is not based on ordinary principles of respondeat superior, but is instead premised on 'a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care.'" *Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001) *citing Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984). Supervisory liability under § 1983 must be supported with evidence that: (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994). Plaintiff has pointed to no action or inaction on the part of Stouffer and Maynard that resulted in the constitutional injury suffered. Although he suggests that Madigan was imbalanced and should not have been hired, there is no evidence to support that

theory. Moreover, once Madigan's conduct was made known to supervisory officials he was placed on administrative leave and ultimately removed from the job. Thus, this is not a case where gross misconduct was overlooked and thereby tacitly authorized. Stouffer and Maynard are entitled to summary judgment in their favor.

Conclusion

Summary judgment will be granted in favor of Stouffer and Maynard, but denied as to Ross. Plaintiff's Motion for Summary Judgment shall be denied without prejudice. In light of Plaintiff's incarceration in another state, counsel shall be appointed to represent Plaintiff for all purposes, including obtaining service on Madigan, conducting discovery, filing motions, and proceeding to trial. A separate Order follows.

September 9, 2010
Date

//s//
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938	*	
Plaintiff,	*	Civil No. AW-09-2367
v.	*	
GARY MAYNARD, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

CONSENT MOTION FOR LEAVE TO AMEND DEFENDANT MICHAEL ROSS'S ANSWER

(Filed Aug. 2, 2011)

Defendant Michael Ross, through counsel, moves, under Fed. R. Civ. Pro. 15(a)(2), for leave to amend his answer to the complaint (Doc. 1) and in support of his motion states:

1. Defendant Michael Ross filed an answer to the complaint in this action on November 19, 2009. (Doc. 6.) On February 4, 2010, defendant Michael Ross filed a motion to dismiss, or, in the alternative for summary judgment (Doc. 18), which was denied without prejudice on September 9, 2010. (Doc. 33.) The parties are now engaged in discovery. (Doc. 62.)

2. Leave to amend a pleading before trial should be freely granted. Fed. R. Civ. Pro. 15(a)(2). Defendant Ross's original answer was made at the

commencement of the case and was made without the benefit of discovery. The proposed amended answer, attached here, clarifies defendant Ross's position and updates the affirmative defenses defendant Ross intends to assert in response to this action. In accordance with Local Rule 103(6)(d), undersigned counsel has obtained consent from the other parties to this litigation to seek leave to amend.

3. No depositions have been taken in this action and approximately two months remain in the discovery period agreed to by the parties to pursue any additional discovery desired by the parties as a result of this amendment. *See*, Third Amended Joint 26(f) Report (Doc. 62) (setting deadline for all discovery as September 30, 2011). Moreover, no trial dates have been scheduled. Therefore, the other parties and the Court will not be prejudiced by the granting of this motion.

WHEREFORE, defendant Michael Ross requests that he be granted leave to file an amended answer to the complaint. The proposed pleading, a comparison copy of the amended pleading, and a proposed order are attached.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

/s/

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August 2, 2011

Attorneys for Defendant
Michael Ross

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938	*	
Plaintiff,	*	Civil No. AW-09-2367
v.	*	
GARY MAYNARD, *et al.*,	*	
Defendants.	*	

* *

AMENDED ANSWER

Defendant Michael Ross, through counsel, answers the plaintiff's complaint as follows:

1. Defendant admits that on June 21, 2007, at the Maryland Reception, Diagnostic and Classification Center, he was involved in escorting inmate Shaidon Blake, #343-938, along with Lieutenant Madigan. Defendant denies the remainder of the plaintiff's allegations as to him and his actions.

2. Defendant admits that he witnessed Lieutenant Madigan strike the plaintiff more than one time. Defendant has insufficient information to admit or deny the remaining allegations as to Lieutenant Madigan, and therefore denies them.

3. Defendant admits that additional correctional officers were called to the scene and that inmate Blake was escorted to medical. Defendant has insufficient information to admit or deny the remaining allegations related to the events of June 21, 2007.

4. Defendant states that the legal conclusions contained in the complaint do not require response. To the extent a response is required, all such conclusions are denied.

5. Defendant has insufficient information to admit or deny plaintiff's claim that his pre-existing mental and physical conditions were worsened by the incident, and therefore denies all such allegations.

6. Plaintiff's request for relief is not an allegation for which answer is required. To the extent an answer is required, defendants denies that plaintiff is entitled to the requested relief or to any relief whatsoever.

DEFENSES

1. Defendant denies every allegation in plaintiff's amended complaint not expressly admitted.

2. The plaintiff's amended complaint fails to state a claim for which relief may be granted as to defendant Ross.

3. Each and every act and action of the Defendant taken with respect to the Plaintiff was done and performed in good faith, in the official discharge of his duties as an employee of the State of Maryland, and with a reasonable belief as to the constitutionality of his actions for which he enjoys a qualified immunity. from liability.

4. Plaintiff's claims are barred because defendant enjoys state personnel immunity, immunity under the Maryland Tort Claims Act, and qualified immunity.

5. Plaintiff's claims are barred by failure to properly exhaust all administrative remedies available to him as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*

Respectfully submitted,

DOUGLAS F. GANSLER
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/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938, Plaintiff, vs. GARY MAYNARD, et al., Defendants.	:	Civil Number AW-09-367

DEPOSITION OF LATIA WOODARD

Washington, D.C.

Wednesday, August 10, 2011

* * *

[41] Q And at this point, Mr. Blake was continuing to tell Mr. Madigan not to touch him?

A Yes.

Q And was Mr. Ross saying anything at this point?

A No.

Q And was Mr. Madigan saying anything at this point?

A No.

Q And was Mr. Madigan still holding on to –

A Yes.

Q – Mr. Blake?

How far along were they walking when Mr. Madigan hit Mr. Blake?

A Maybe five steps.

Q And were they walking while the hit occurred?

A No, they were standing still.

Q Why were they standing still?

A I have no idea.

Q They just stopped?

[42] A Yes.

Q And where was Mr. Ross at this point?

A Ross was on Blake's right side holding him.

Q Can you mark – please mark an H on the map where the first hit occurred?

Could you hear everything the whole time?

A Yes.

Q Was there any radios on – radio communication going on during that time?

A I'm not sure.

Q Was there any possibility that Mr. Ross and Mr. Madigan said something that you didn't hear?

A I'm not sure.

Q How loud was Mr. Blake when he was saying "don't touch me"?

A He was pretty loud.

Q And typically, are there correctional officers as loud?

A No.

Q So it's a possibility that you heard him because he was so loud and the correctional officers [43] were quieter?

A Right.

Q So tell me about that first hit. Where were you standing?

A I was standing in front of the three of them.

Q They were facing you?

A Actually, they were up on the wall, and I was directly right there.

Q Okay. Approximately how close would you say you were?

A Maybe 2 feet.

Q Were you looking directly at them?

A Yes.

Q And did Mr. Madigan let go of Mr. Blake before he hit him?

A No.

Q So he was holding on to his left arm?

A Right.

Q That's correct?

A Yes.

Q He was holding on to his left arm. And do [44] you remember if he was holding on to his left arm with his right hand or his left hand?

A At the time of the punch, I'm not sure.

Q And it was a punch?

A Yes.

Q Was it closed or open fist?

A Closed.

Q Closed. Did you see him have anything in his hand?

A No.

Q No, he didn't have anything in his hand or no, you didn't see anything?

A No, he didn't have anything in his hand.

Q How hard would you say that punch was?

A I don't think – I don't think it was that hard.

Q Would you say that it was a, like, "hey you" punch or an actual, like, full-swing punch?

A I want to say maybe a "hey you" punch. I don't think it was hard at all.

Q And was Mr. Blake standing up against a wall?

[45] A Yes.

Q And did Mr. Blake's head hit the wall at any point?

A I'm not sure.

Q You didn't see?

A I can't remember.

Q Can't remember. And what happened after the first punch?

A I believe Blake said, "Hit me," and Lieutenant Madigan hit him again.

Q Was – did Lieutenant Ross say anything at this point?

A I'm not sure.

Q Was Lieutenant Ross looking at Mr. Blake and Mr. Madigan at this point?

A I'm not sure.

Q How was he still holding on to Mr. Blake at this point?

A He was still holding on to his right arm.

Q Up against the wall?

A Yes.

Q So there was at least a second hit?

[46] A Yes.

Q And was there – did you see a third hit?

A I want to say it was, because there was several.

Q There were several?

A Yes.

Q And approximately how long in between each of these hits?

A Maybe five seconds.

Q And were they standing still during – when this occurred?

A Yes, but I want to say Lieutenant Ross was moving towards – still moving towards 7B at the time. So the whole time they wasn't just standing there.

Q So he was still moving towards 7B while holding on to Blake?

A Right.

Q But Blake and Madigan were still standing still?

A No, they were – I want to say they were moving too, but the first hit they was standing [47] still.

Q Okay. And then they started moving?

A Right.

Q And where – can you mark a 2 by where the second hit occurred?

A I want to say it's the same – basically, the same area. Still want me to mark it?

Q No, that's fine, if it's the same area.

Did you say anything at this point to anyone?

A I told Lieutenant Madigan to let Blake go because Sergeant Ross had him under control.

Q And did – Mr. Ross didn't say anything?

A I can't recall.

Q Why did you tell Madigan to stop hitting Ross – or to stop hitting Blake?

A I really felt there was no need. He had no reason to hit him.

Q Why would he have had no reason?

A Blake wasn't a threat to any of us.

Q Do you receive any training for what to do when another officer is using force, unnecessary [48] force?

A No, not really.

Q So there's no procedures or anything?

A I'm sure it is, but I've never been in that situation, so I really can't say.

Q What – in your opinion, what should a guard do in a situation like that?

A Call for assistance.

Q Did you say anything else during the assault?

A No, I just kept telling Lieutenant Madigan to let him go.

Q And after you said that, did any other hits occur, anymore punches?

A I'm not sure.

Q Was there any way – Mr. Blake was handcuffed; correct?

A Yes.

Q So did he have the ability to put his hands up to shield his head at all?

A I'm not sure, because I'm not sure if he was handcuffed from the front or the back.

[49] Q Did you see him move to put his hands up, to cover his face?

A I'm not sure because I don't know if he was cuffed in the front or the back.

Q Did you see him make any physical movements during this?

A No.

Q No? After you said to Mr. Madigan to stop, did Mr. Madigan say anything to you?

A I'm not sure right after, but a while after, he asked me to mace Blake.

Q How long after?

A Maybe a minute or two into the confrontation.

Q So how long – how long would you say between the first punch and when you were asked to mace Mr. Blake?

A Maybe a minute.

Q At any point, did Mr. Ross call for assistance?

A No.

Q But you said a guard should have called [50] for assistance?

A If they need it.

Q And in your opinion, you thought assistance was needed?

A At the time no, because Lieutenant Ross had Blake under control.

Q But Mr. Madigan was still hitting Mr. Blake?

A Yes.

Q So how would you stop Mr. Madigan from hitting Mr. Blake?

A I guess to call for assistance.

Q You said Mr. Madigan asked – asked you to mace Mr. Blake?

A Yes.

Q And did you orally refuse? Did you tell him no?

A Yes.

Q Did you give him a reason?

A No.

Q But why did you refuse?

A Because Blake wasn't a threat to any of [51] us.

Q Is there anything in the procedures about macing inmates?

A Yes.

Q Do you know what particular procedure that would be, what it says?

A When you feel threatened.

Q When you feel threatened. Do all officers carry mace?

A Yes.

Q So do you know why Mr. Madigan asked you to mace Blake rather than macing him himself?

A No.

Q Or rather than having Mr. Ross mace Mr. Blake?

A No.

Q Was assistance ever called?

A Yes.

Q Who called for assistance?

A I did.

Q And what happened? How did you call for assistance?

[52] A I radioed over – I sent a radio signal 13. That was told to me by Sergeant Ross.

Q Sergeant Ross told you to signal – when did he tell you that?

A As we were moving towards the elevator.

Q And this was while the punches were occurring?

A After.

Q After. What is a signal 13?

A An inmate on an officer.

Q An inmate on an officer?

A Right.

Q Is there any signal for officer on an inmate?

A No. It would be basically the same thing.

Q Did you step away to make the call?

A I wasn't directly in front of them, but –

Q How close were you to them at this point?

A Maybe 3 feet away.

Q And did you have to go anywhere to make the call?

A No.

[53] Q Did you have to look away to make the call?

A No.

Q Was telling you to call the signal 13 after the punches had stopped the only thing that Mr. Ross said during the assault?

A Yes, that I can recall.

Q What happened after you called the signal 13?

A Officers started responding.

Q What does that mean?

A They came to where the incident occurred.

Q They came to – I'm sorry?

A Where the incident had occurred.

Q Did they come from 7 Charlie? 7 Bravo?

A They came from off the elevator.

Q And how many officers responded?

A I'm not sure. There was a few.

Q And do you know the procedures for responding to a signal 13?

A Yes.

Q What are those procedures?

[54] A We go to where the code is called and basically grab the inmate.

Q Have you ever participated in a signal 13 before?

A No.

Q That was your only signal 13?

A Yes.

Q And what – where was Mr. Ross, Mr. Blake and Mr. Madigan at this point?

A On the floor.

Q Did you see them get to the floor?

A Once I seen them getting – the response team getting off the elevator, I looked over and I seen that they had went to the floor.

Q So you had turned away between calling the signal 13 and the response team?

A Well, I was still looking at them when I called the signal 13. Then I must have looked away, because I didn't see them until I looked back, I seen them on the floor.

* * *

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE, a/k/a SHAMVOY SMITH,	:	
Plaintiff,	:	Civil Action Number
vs.	:	AW-09-367
GARY MAYNARD, et al.,	:	
Defendants.	:	

DEPOSITION OF CANDIS FIELDS

Washington, D.C.

Wednesday, August 17, 2011

* * *

[34] Q Was the inmate disrespectful to you?

A No.

Q Had you seen him be disrespectful to any of the other guards?

A I hadn't seen him interact with anybody else.

Q So would you have written the ticket if Madigan hadn't told you to?

A Probably not.

Q Now, when Lieutenant Madigan and Mr. Ross were going to take the inmate from his cell, you said that Madigan asked for your handcuffs?

A Yes.

Q And why did he ask for your handcuffs?

A Probably because he didn't have any.

Q Do lieutenants not have handcuffs?

A I've never seen it like as a common practice for them to wear handcuffs.

Q They don't typically have handcuffs?

A Not that I know of.

[35] Q And did he also ask for your keys?

A Yes.

Q And do they typically not have the keys either?

A No. Each key set is only for that particular unit. It goes to only those doors.

Q And after you gave him your keys, what did you do right after that? Did you stand there? Did you go somewhere else?

A No, I sat there.

Q You sat there?

A Uh-huh.

Q You indicated that they had to go down a set of stairs.

A Up.

Q They went up a set of stairs?

A Yes.

Q Where were Mr. Madigan and Mr. Ross in relationship to the inmate at this point?

A They went up the stairs to get him from his cell. His cell was upstairs, was up the steps.

Q And after they got him out of his cell, [36] did they have to come back down the steps?

A Right.

Q Where were Mr. Madigan and Mr. Ross in comparison to the inmate at this point?

A Sergeant Ross was behind him, like on an angle. Like you're supposed to be on an angle when you're holding him. And he was just holding – just like holding their right arm.

Q And what about Mr. Madigan?

A He was like at his side behind him.

Q Was he also holding?

A No.

Q Is that what he was supposed to be doing?

A Yes.

Q Did you see Mr. Madigan touch the inmate at all on the stairs?

A No; not that I remember, no.

Q Then they went out through the door?

A Yes.

Q And you said that Mr. Madigan hit Mr. Blake. Is this before or after the door was closed?

[37] A While the door was closed – I mean, while the door was open. They were like going out the door.

Q Was there anything between you and Mr. Madigan while he hit Mr. Blake?

A You said was there anything –

Q Anything in between you. Is there any reason you would not have seen something?

A No.

Q How far away were you at this time from them?

A I was at the desk. So that's probably – I don't have a measurement, but not that far, probably like from where I'm sitting to where she is.

Q So approximately 5 feet?

A Probably a little less than that.

Q Probably a little less than 5 feet?

A Yeah.

Q And where was Mr. Ross at this point?

A Still holding him, still doing his escort like he was supposed to, holding his arm.

[38] Q Where was Mr. Madigan in relationship to Mr. Ross?

A By that time he was – he was still like where he was at before, coming down behind him.

Q So Mr. Madigan was behind the inmate, and Mr. Ross was holding on to the inmate?

A Right; yeah. He was doing a proper escort, like holding him.

Q And how did Mr. Madigan hit the inmate? What kind of a hit was it? Was it a closed fist? Open hand?

A Closed fist.

Q Was there anything in his fist?

A Now, that, I don't remember. I know he hit him, but I don't remember that or not.

Q What was Mr. Ross doing at this point? When the hit occurred, what was Mr. Ross doing?

A Still holding him. They was going out the door. It was like a quick thing. So he was like holding him. He hit him. That's when the guy like started jerking out, I guess.

Q Did you see any other hits after the first [39] one?

A No. I remember that one, but I don't remember any after that.

Q Did you see Mr. Ross do anything after the first hit?

A No. They were going out the door. So like – I'm not sure if you've seen Sergeant Ross, but he's a big dude, like tall. The doorways are kind of like narrow doorways. They were going out of the door like at the same time. But when he hit him, that's when the guy like started jerking out. So they were going out the door.

Q So they were in the doorway when this occurred?

A Yeah, like kind of sort of – you know, like generally walking.

Q And what's the procedure when a guard hits an inmate?

A I don't know.

Q What would you have done if you had the ability to do anything at that point?

A I don't know. I mean – I don't know.

[40] Q If you were holding on to an inmate and another guard hit an inmate, what would you have done?

A Honestly, I don't know.

Q You don't remember any procedures or anything? Nobody talked to you about what to do if a guard hit an inmate?

A No. I mean, because the guy started like jerking out, and Sergeant Ross is holding him. So I guess try to gain control. You would try to regain control.

Q Anything about any reaction to the guard that's actually doing hitting?

A What do you mean?

Q Are you supposed to stop the guard that's hitting the inmate?

A Are you supposed to stop – yeah, I believe you're supposed to stop them. The natural thing would be –

Q How would you stop the guard that was trying to hit the inmate?

A I don't know. I've never been in that [41] position. I don't know. I guess it would be an instinct thing. I don't know.

Q And you said the door closed between the – right after the first hit?

A Right. I only seen him hit him once.

Q And when did the door close?

A Like right after, like when they were – like they were going through the doorway. That's when I seen – I guess that's when I seen him hit him. I know he hit him. So when they went through the doorway, that's when the guy was like jerking out or whatever. It's like a big metal door. So as soon as you let it go, it closes.

Q And this is when all the inmates were –

A They were locked in.

Q And they were banging on the door?

A Right.

Q And you turned around to deal with the other inmates?

A Right.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938, Plaintiff, vs. GARY MAYNARD, et al., Defendants.	:	Civil Number AW-09-367

VIDEOTAPED DEPOSITION OF MICHAEL ROSS

Washington, DC

Wednesday, August 24, 2011

* * *

[42] Q Who did you ask why?

A I don't know. See, I can't really recall.

I'm – I want to say that it might have been – Lieutenant Madigan might have knew more information than I did. But I remember they – it might have been him that said that he was on the tier, like he was trying to run the tier, trying to start, I guess you can say, a little – a little gang, a group of guys up on the tier, by like controlling the television set on the tier. He controls when the TV comes on, when it goes off, who will see what channel, like that.

That's my recollection.

Q Who told you that?

A I don't remember.

Q So what did you do after you got that call?

A I proceeded to 7 Charlie.

Q And what happened –

A Along with Lieutenant Madigan.

Q And what happened when you got there?

[43] A So when I got to the tier, I asked the officer what cell was – the inmate was in, and she told me he was in cell 22.

So at that time, I decided, since I was the sergeant and Madigan was the lieutenant, to let him take lead and I would just play backup, the backup role.

That's when we went up to the inmate's cell door.

Q Who was the officer that told you which cell he was in?

A Ms. Fields, Candis Fields.

Q And what happened when you got to the cell door?

A Well, when we got – when we got to the cell door – we got to the cell door. He – Lieutenant Madigan asked the inmate, you know, that he – asked him,

do you want me to open up the door. He told me – he kept the door shut and told them that he was going to go on lockup, to start packing up his stuff.

And after that – you want me to just [44] continue?

Q Please.

A And after that, he – he told me to go ahead and open up the door. So I opened up the door, and now the door to the pod is open. And inmate Blake is standing, like, right at the door but still inside the cell.

And Lieutenant Madigan, he pulled out a set of his handcuffs, and he was actually holding the handcuffs like this (indicating) and telling him that he was about to place him on lockup because he was trying to excite a riot up on – on the tier.

So of course, the inmate didn't agree. He was saying that he wasn't trying to do anything.

And so he – so at that time, like maybe a minute or so, so I was just standing there.

And you see the inmate was just, you know, looking. So that's when I decided I would – I said, well, let me just put the handcuffs on the inmate, because I didn't want too much time to go past, because then he might become resistant.

So that's when I – that's when I stepped [45] inside the cell with Mr. Blake, and I told him that, you know, I was going to, you know, put – place the

handcuffs on him and put him on lockup. And he said okay. He said because I'm – like he said, like, "I'm cool with you, Ross."

Then he got to talking, he says – he must have had a complaint or something before and asked to see a lieutenant, and he said that the lieutenant didn't come up there on the tier.

And so now – so that's why he got mad. And he was like, "well, don't come up here now to lock me up. You didn't come up here earlier to see what I wanted."

And at this time, I put the handcuffs on. Then I – you know, hands behind his back,

Mr. Blake. And once I finished placing the handcuffs on him, we was ready – I was ready to escort him to 7 B, which is right down the hallway.

Q So whose handcuffs did you use?

A Mine.

Q Where – where did you get the keys to unlock the pod and Blake's cell?

[46] A I got that from Ms. – Ms. Candis, she was running the tier. She was – she was still down at the desk at the time. So I got her keys and came up to unlock the door to the cell.

Q You did?

A Uh-huh.

Q What did you do with the keys after you unlocked the door?

A I think when I entered the – when I entered the unit, I passed the keys to – when I entered the cell, I passed the keys to Lieutenant Madigan.

Q What did Mr. Madigan do with the keys?

A I don't recall.

Q Let me take a step back. The call you received to go 7 Charlie and remove Mr. Blake to take him to 7 Bravo, that was the first call you got that day involving Mr. Blake?

A Yes.

Q So once you put the handcuffs on Mr. Blake behind his back, what happened next?

A Once I placed the handcuffs on Mr. Blake, [47] I was about to escort him out the cell – Mr. Blake went out the cell first, and I was coming out right behind him.

And once – once we got into the – outside the cell, Lieutenant Madigan had – you know, had touched the other arm of Mr. Blake, and he, like, twisted like, you know, told the lieutenant to get off of him, that, you know, he couldn't come see what he want, he said, you know – well, I don't know if he called me Sergeant Ross, he said, "Ross going to escort me to lockup."

And so, all right, so now I'm outside the cell too. Then we was going down the steps, and me and Mr.

Blake was side by side coming down the steps, and I remember he, like, shrugged, like moved his shoulders another time.

And I looked at him, and he said that –he said for Madigan to get off him again, so I just assumed that Madigan had, you know, had touched him again.

Q So – I'm sorry, go ahead.

A At the time, that's when I told Lieutenant [48] Madigan, like, you know, I got him, I got him. I remember saying that to him, to the lieutenant.

Q So when you left the cell, were you holding onto Mr. Blake?

A Yes.

Q And how were you holding onto him?

A When we left the cell, I had his left arm as he was going outside the cell, like right behind him.

Q You had his left arm?

A Uh-huh.

Q Which hand were you holding him with?

A My right hand.

Q And then at some point after you left the cell, Mr. Madigan tried to put his hands on Mr. Blake?

A Yes.

Q And what part of Mr. Blake was Mr. Madigan trying to hold?

A His right arm.

Q And how was Mr. Madigan trying to hold Mr. Blake's right arm?

[49] A I mean, I believe with his – with his arm. I don't know which one he used or anything like that, because I was on the opposite side.

Q When escorting a prisoner, do more than one guard have to keep control of an inmate, or is one guard holding an inmate sufficient?

A It – it really depends on the inmate. He determines – I mean, you can escort an inmate with just one guard and one inmate.

Q With Mr. Blake, when you left the cell and you were holding his left arm with your right hand, did you think that was good enough?

A Yes, I did.

Q So once Mr. Madigan tried to grab hold of Mr. Blake's other arm, that's when Mr. Blake started twisting? Is that what you said?

A Yes, like –

Q Did you say anything to Mr. Madigan at that point, at the first time he tried to grab his arm?

A No.

Q So then you approached the steps?

[50] A Uh-huh.

Q And what happened on the steps?

A When we started down the steps, we got toward the end of the steps, I guess this might be about – about, I'm going to say, 12 steps.

When we got toward the end of the steps, Inmate Blake had – you know, like twisted his body again (indicating). And then that's when – and that's when I assumed that – that Madigan had tried to grab his arm again.

So that's when I informed Madigan that, you know, I got him, I got him.

Q Did you say anything else to Mr. Madigan?

A No, not at that time.

Q Did Mr. Madigan say anything to you?

A No, not that I can remember.

Q Did Mr. Madigan keep trying to grab hold of Mr. Blake?

A Well, once – once we reached the bottom of the steps, he never – he didn't try again until we was escorted outside of the unit, into the hallway.

[51] Q When you were the only one holding Mr. Blake's arm, was Mr. Blake twisting or doing anything –

A No.

Q – at that point?

Did anything else happen on the steps?

A Not that I can recall.

Q Was Mr. Madigan behind you and Mr. Blake on the steps?

A Yes.

Q So you couldn't see what Mr. Madigan was doing?

A No, I couldn't really see what he was doing.

Q After you reached the bottom of the steps, what happened next?

A Well, then we had to – you have to, like, walk approximately 20 feet to the door, the front door of the pod where you came in at.

And at the front door is an officer's desk there and where the officer sits at. And officer Candis Fields was sitting at the desk, and with me, [52] it's always – if we was called to a unit, then it would probably all start because that officer called us to the unit because he had a – had a complaint.

And if I have an inmate in handcuffs and have to walk out the door, I don't like taking the inmate past the officer who really – because the inmate might spit on the officer, because they're already going to be mad because they're going to lockup.

So I always tell the officer to move away from the door as I – as I'm exiting.

So that's what I did with Officer Fields. I told her to move away from the door. And the corridor officer opens up the door, so she don't have to open up the outer door to let us out.

Q So Ms. Fields, did she move away from the door?

A Yes.

Q And there was an officer on the other side of the door?

A Yes.

Q Who was that?

[53] A Officer Woodard.

Q And did she open the door?

A Yes.

Q So then did you, Mr. Blake and Mr. Madigan go through the door?

A Yes.

Q And how were you –

A Me – me and Mr. Blake went outside – I remember me and Mr. Blake went outside the door, outside the pod into the hallway. That's when I was still holding on to his left arm with my right hand.

And as we exited the pod, Lieutenant Madigan was behind us. And then once we – once we hit the corridor, that's when I noticed Inmate Blake really started twisting and like he was trying to get away from me, and I really couldn't understand why he was trying to get away from me.

And once I looked, I saw that Lieutenant Madigan had came up and, like, put his arm through and had a – had his other arm, his right arm, the inmate's right arm with his – I'm going to say his left arm, with Lieutenant Madigan's left arm.

[54] And the inmate was just – Inmate Blake was just – he was just mad. All his frustrations was really toward Lieutenant Madigan. He didn't want him to touch him at all.

Q And you were already through the door at this point?

A Uh-huh.

Q And you were still holding Mr. Blake's left arm?

A Right.

Q What happened next?

A So as – as he was using all his force – I mean, I was – I was still holding him, and I told Lieutenant Madigan again at that time, you know, that I got him, I got him.

But Lieutenant Madigan never let go of his arm. So we were, like, just, I guess you could say like struggling back and forth. And my mind then was like, come on, we still have to put you on lockup, so I'm trying to move toward 7 Bravo, so I'm, like, taking steps as we move him, but he – Mr. Blake, he was – just kept saying, "get off me, [55] get off me," talking to Lieutenant Madigan.

And then at that time, Lieutenant Madigan, I think it was his right hand, threw – like threw – I guess you could say threw a punch towards inmate – Inmate Blake's face.

And once he struck Inmate Blake's face, Inmate Blake was really mad at that time. And what was the question?

Q So at the – when that happened, you were still holding Inmate Blake's –

A Yes, his left arm.

Q – left arm?

So you had Mr. Blake under control at that point?

A Yeah, I mean, I felt that I had him under control, whereas he wasn't going to break away from me.

Q And you told Mr. Madigan "I got him"?

A Yeah, that was my words to him.

Q Did Mr. Madigan say anything in response?

A No.

Q So Mr. Madigan – you said he took a – [56] took a punch at Mr. Blake?

A Yes.

Q Did he make contact with Mr. Blake?

A I believe so.

Q Did you see where on Mr. Blake he made contact?

A No. I'm going to have to say the face area. I'm going to have to say the face area.

Q Was Mr. Madigan's hand in a closed fist?

A I believe so.

Q Did he have anything in his hands?

A Not that I can recollect.

Q What happened after he made contact – Mr. Madigan made contact with Mr. Blake's face?

A Well – well, of course, at that time Mr. Blake became more aggressive. And as we was struggling, I noticed he – all his anger was toward Madigan. It really wasn't toward me. He just wanted Madigan to get off him, don't touch him. That was his whole – his whole thing.

And so at that time, that's when I – if I did – it's like a wall. So I, like – since we [57] was, like, struggling, we had went closer to the wall. And that's when

I just looked – because it seemed like he was – to me, since Mr. Blake was more letting me do something to him instead of Lieutenant Madigan, that's when I looked at Mr. Blake, I just – we were in the hallway, and I looked in his eyes and told him, come on, let's go to 7 B.

And he didn't – he really didn't say anything like okay or anything like that.

So then as we kept going, then that's when I heard – the next I remember, Mr. Blake said, "he hit me again." He was telling me that Lieutenant Madigan hit him again, but I didn't see him – I didn't see Madigan hit him at that time.

But I was constantly looking up at Corporal Woodard too, in the direction I was supposed to go taking the inmate to.

And when he said that, I was like, what? And he said it again. So now I'm like thinking, well, I really got to get him to 7 B now on lockup.

So – but as I'm thinking that, Lieutenant [58] Madigan tells Corporal Woodard to mace inmate – Inmate Blake. And when she said – when he said that, she – I looked at Woodard, and she – she was – she was a fairly new officer, she might have been a CO-I, I'm not really sure at the time, but I just remember her being a new officer at the time.

And she was just looking like she was – you know, like she was scared. And I can't – I remember – I don't even know if she said something or she did – I

just remember looking at her, because I didn't really want her to mace the inmate. And –

Q Why not?

A Because to me, it would have made the situation worse, because – because as my feelings, I was feeling like, you know, I can get him without using mace.

And so then I know Lieutenant Madigan had yelled it out, you know, at the – at Corporal Woodard a second time to, you know, mace him. And then when I looked at her, she had this look in her eyes like – you know, like should I? Shouldn't I? [59] He's – you know, like that.

So I just told her, you know, I told her, don't mace him. I told her call a signal 13, because that means that officer is fighting.

Because at that time, I felt as though we needed some more officers up there.

Q Did you say anything to Madigan?

A No, not – not other than the time that I told him I got him, after we were already into – from out of the pod.

Q Other than that time that you said "I got him," there was no other instance where you said something to Mr. Madigan?

A No.

Q When Mr. Blake said that Mr. Madigan had hit him again, you were still holding on to Mr. Blake?

A Uh-huh, on his – I was on his left – left side, and Madigan was on his right side, inmate Blake's right side.

Q But you weren't watching Mr. Blake?

A No, I was – I was – I would look at [60] Blake, and then I looked up in the direction we was going. I was looking up toward Corporal Woodard. She was like up the hallway a little bit. And that's when I heard Blake said, "Ross, he hit me again."

I turned around and looked at him. That's when I told him, "come on, we going to 7 Bravo."

Q Did you feel Mr. Blake jerk or make any other motions?

A I mean, he was – he never really stopped jerking and moving around, trying to get away. All his aggressions was toward Lieutenant Madigan. And that was another reason why I didn't – I didn't want to let him go, because I – I mean, he still had the opportunity with his feet, so I really didn't want to let him go, because I know he was going to go straight at Lieutenant Madigan with all the aggression that he had and anger towards him.

Q Was Mr. Blake up against a wall at that point?

A No. We was, like, right – right close to the wall, and that's when I told him that we're [61] going to go to 7 Bravo, 7 B.

Q Did he hit against – did his body hit against the wall at any point?

A If anything, his shoulder – his shoulder might have touched the wall, Mr. Blake's shoulder.

MR. CLAFFEE: Okay. We need to change the videotape, so we're going to go off the record and take a short break, like five minutes.

THE WITNESS: Okay.

VIDEO OPERATOR: We're off the record. The time is approximately 11:19 a.m. This is the end of tape number 1.

(Recess.)

(Mr. Goeke joined the deposition.)

VIDEO OPERATOR: We are back on the record. The time is approximately 11:34 a.m. This is the beginning of tape number 2.

BY MR. CLAFFEE:

Q Okay. Mr. Ross, before the break, we were – you were explaining Mr. Madigan asking Ms. Woodard to mace Mr. Blake?

A Correct.

[62] Q And what did you do when Mr. Madigan made that request?

A At that time I informed Corporal Woodard to – not to mace Mr. Blake, to call a signal 13, which means officers fighting.

Q Did Corporal Woodard say anything in response to Mr. Madigan's request to have her mace Mr. Blake?

A I don't recall. I think she – I think she was telling Madigan to let him go, let Ross escort him. I think she was saying that. I didn't really think about it.

Q What did you say signal 13 means?

A It means officers fighting. That means, like, officer needs assistance.

Q Officers fighting each other or fighting an inmate?

A Fighting an inmate. That's what it means, when you hear the words "signal 13."

Q Are there different signals for an officer fighting an inmate versus an inmate initiating a fight with an officer?

[63] A Well, it's – it's another code that they use that officers might use. Let's say if they was calling me, they would tell me to 1025 their unit. And when an officer tells me 1025 his or her unit, I know that pretty much they want me to start on my way to that

unit, that either they are into a confrontation with an inmate and they feel as though it might get out of hand, and they want me to start making my way to the unit.

Q Have you ever gotten a call like that? A 1025?

A Yes.

Q Can you describe the circumstances of that call?

A Like I say, you might – when you hear, it's like other officers is in the area, they're going to start towards that unit.

And, I mean, one instance might have been you're at the unit and the inmate was just arguing with the officer, and the officer might have felt uncomfortable and either he or her decided to let some officers know to start on their unit, because [64] they didn't know the actions of the inmate, what they were going to be.

Q What's the difference between the 1025 and a signal 13?

A Well, 10 – 1025 is, like I say, when – when they are maybe arguing or they think it might be a physical confrontation with the inmate. Signal 13, when there is a physical confrontation with the inmate.

Q So you told Corporal Woodard to call the signal 13?

A Yes.

Q Why did you tell her to do that?

A Because at that time, I wanted to get more officers on the scene as quickly as possible, and I felt I didn't want the situation to get any worse.

Q Why didn't you call the signal yourself?

A Because I was engaged with Mr. Blake. It would just be – because she had her hands free.

Q You were still holding Mr. Blake's left arm?

A Left arm.

[65] Q What was Mr. Madigan doing at this point?

A At this point, I really – I really couldn't tell you what he was doing. I just know he was on the other side. I didn't really – everything was happening so fast that once I heard him tell her to mace him, I decided then to just take complete control of the whole situation.

And once I know I told Corporal Woodard to call a signal 13, the other officers are going to be coming as fast as they can. And I know the adrenalin level was going to be high.

Q Did you say anything to Mr. Madigan at that point?

A I don't – I don't recall at that point. I said something to Inmate Blake once I –

Q What did you say?

A I told Inmate Blake that me and him was going to go to the floor because I know the other officers were coming, and I didn't – well, I told him that we was going to go to the floor. The reason I said that was because I didn't want me and him to be standing up going through this physical [66] confrontation when the other officers come.

Q Were you and Blake in a physical confrontation at that point?

A We was still – I mean, the whole time, me and him was still – I mean, he was still twisting and turning the whole time. He never stopped.

Q To try to get away from Mr. Madigan?

A It's like – at the time thinking that Madigan still had hold of him, he was still trying to get off. But he was – he was mad at Mr. Madigan, so he was – I think his intention was to get Madigan off of him.

Q Was he mad at you?

A I really don't think he was, no, to my knowledge.

Q What did – what did Blake say – Mr. Blake say to you when you told him you were going to take him to the floor?

A He said okay.

Q So he agreed to be taken to the floor?

A Uh-huh. Oh, yes. Sorry.

Q So Mr. Blake was compliant at that point [67] with your instructions?

A He was compliant verbally, but he was still – he was still struggling. I mean, never stopped. Even though he said okay.

And when – when I – when I attempted – we was, you know, going to the floor, I'm thinking it was going to be nice and easy, go to the floor.

But he – but to me, once we tried to go to the floor, I noticed he wasn't – wasn't coming to the floor. So I figured – I said maybe he changed his mind.

And so – so then as we – I went on and started going to – I said, well, if I go to the floor, he going to have to come with me, because I'm still holding on to his arm.

But then for some reason, his foot had crossed and hit – hit my foot, so we end up instead of me going down control, we – once I got tilted over, we was falling to the floor.

So we went on and fell to the floor. I remember hitting the floor, and Inmate Blake hit the floor right – right beside me, and Lieutenant [68] Madigan had hit the floor on the other side of Blake.

And at that time, it seemed like Mr. Blake was, like, really frustrated because he was like, you know, get me up, like – he was telling me to get him up off the floor.

So I told, you know, Madigan to get off him. We all on the floor. And then I told him, I said, "I don't want to get you off the floor, because the team going to be in another couple seconds," and I'd take him off the floor then.

So at that time, that's when the team started arriving on the floor, the response team.

Q Is there a procedure for taking a prisoner – an inmate to the ground in a controlled manner?

A I don't think there's a procedure.

Q Did you receive any training on how to take an inmate to the floor?

A No. I don't recall any training how to take him to the floor.

Q Prior to this time, had you had any other [69] occasion to take an inmate to the floor?

A No.

Q Have you ever seen anyone else take an inmate to the floor?

A Yeah, I'm pretty sure I have seen take an inmate to the floor.

Q And how did the guards take the inmate to the floor in those instances?

A Just grab them and throw them to the floor.

Q How did they throw them to the floor?

A Most of the time, if they were going to take them to the floor, they would just wrap their arms around them and then both of them just fall to the floor.

Q Is that what you were trying to do with Mr. Blake?

A Right. And since he had agreed, my intention was he was just going to come with me going to the floor, instead of kind of resisting me, him just going – like go to the floor, like we just going to lay down on the floor.

[70] Q Were you trying to take Mr. Blake to the floor so that he would be face down or on his back?

A I didn't – I wasn't thinking about whether he – I was going to face him down on the floor or have him on his back on the floor. I think he ended up on his side, he was on the floor.

Q So you were –

A The reason we went to the floor was to me for – just for his protection, so that when the response team arrived, they would see that the – that I had control of the inmate, so I know that once they saw that, then they wouldn't really, you know, interact with us, they would just be like, you know, okay, you don't need us once we get there.

But if it was an instance whereas we're still struggling, then they are probably going to take him to the floor.

Q You were still holding Mr. Blake –

A Left arm.

Q His left arm with your right arm, with your right hand?

A Right, uh-huh.

[71] Q So did you try to take him down by pushing him backwards or pushing him forwards?

A We were – we were both going forward.

Q Toward. So he would have ended up face down?

A Yeah, he probably would have ended up –

Q Did he end up face down?

A He ended up, we went to the floor, he ended up on his side – I believe it was – I believe he was on his side, because I know I was on my side, and he was right – right in front of me, so I think he was on his side, his left side too.

Q You were on your left side?

A Uh-huh.

Q So did you land on top of him –

A No.

Q – or next to him?

A No. I think I hit the floor first, and he came behind me, right in front of me. And then Lieutenant

Madigan, I'm not sure, but I know he was maybe in front of – maybe in front of Inmate Blake. But I know he was down a little bit lower than, you [72] know, me and Blake.

Q Was Mr. Madigan on his back or on his chest?

MR. SACHSE: I'm sorry, on his own back or on Blake's back?

BY MR. CLAFFEE:

Q On his own back?

A I don't really recall.

Q But you landed on your side?

A Right.

Q Your left side?

A Right.

Q And Mr. Blake landed on his own left side?

A I believe.

Q Was Mr. Madigan assisting you in taking Mr. Blake to the ground?

A I don't really – I don't know.

Q How did Mr. Madigan end up on the ground?

A When – when I told Mr. Blake that we was going to the floor, once I told him, he said okay, and we just proceeded to the floor. I mean, I don't know what Lieutenant Madigan was doing at that time.

[73] Evidently, he was still holding on to Mr. Blake, and so that's probably what made – since we were going to the floor, that's probably what made him come to the floor. I believe that's when both of us fell. Since he was holding on to Mr. Blake, he had no choice but to. He would let go or fall to the floor too.

I mean, he might have – I don't know if he heard me say that to Mr. Blake or not. Maybe he didn't know what was going on. I don't – I don't know.

Q So you don't know how Mr. Madigan ended up on the ground?

A No, I just assumed that he was still holding on, so when we hit the floor, if he's still holding on, then he's going to hit the floor.

Q Did you sustain any injuries as the result of hitting the floor yourself?

A I know when I hit the floor, my – and lost my balance, my knees, I came straight down on my knee, so I had an injury to my knee. I think my left knee, I think. I'm not really sure.

[74] Q You came straight down on your knees?

A Uh-huh. Yes. Oh, sorry.

Q I thought you landed on your left side.

A Right. My knees hit first, and then I – the rest of my body fell on over to the left side.

Q What –

A But as – as I'm – as we're going to the floor, it's like I lose my balance. So that's what makes me come straight down to my knees, and then – me and Mr. Blake, and then – and then over to the floor.

Q While you were going to the floor, was Mr. Blake showing any aggression towards you?

A No. But it seemed like if I had just told him that we was going to the floor, he agreed, I couldn't understand why he was resisting more than – you know, than let's just – which made me lose my balance, because, you know, I don't know if something prevented him from coming with me to the floor.

Q Could Mr. Madigan have been preventing him from going with you to the floor?

[75] A It's possible.

MR. SACHSE: Object. I'll just put that on the record.

MR. CLAFFEE: I'm sorry, Doug, what was that?

MR. SACHSE: I was just objecting for what might have happened as opposed to what he actually saw happen.

BY MR. CLAFFEE:

Q Mr. Ross, did you have any injuries to your knees prior to this incident?

A No, not that I can think of.

MR. CLAFFEE: I'm going to ask the court reporter to mark this as Ross 1.

(Ross Exhibit 1 identified.)

BY MR. CLAFFEE:

Q Mr. Ross, did you submit a claim for a work-related injury on or about June 22, 2007?

A Yes.

Q Is Exhibit Ross 1 the claim that you submitted?

A Yes.

[76] Q Is that your signature at the bottom of the first page?

A Yes.

Q And also on the bottom of the second page?

A Yes.

Q You say in this claim, when it – when it asks you to explain how the injury occurred, that you were involved in a fight with inmate – Inmate Blake Shaidon?

A Right, correct.

Q But you weren't actually in a fight with Mr. Blake, were you?

MR. SACHSE: Objection.

THE WITNESS: I mean, what's a fight?

BY MR. CLAFFEE:

Q You tell me how you would define the word "fight."

A I think a fight is when, you know, both parties are probably actually making contact with each other with, I guess, objects or – or fists.

Q Were you engaging in any conduct with Mr. Blake involving objects or fists?

[77] A No.

Q Was Mr. Blake engaging in any conduct with you with any objects or fists?

A Huh-uh, no. No.

Q So you weren't in a fight with Mr. Blake, were you?

A No, I wouldn't say it was a fight. It was – I guess you could say we were – we were struggling, just trying to maintain control, I think that's what it was. I wouldn't say it was a fight.

Q But you wrote on this claim form that you were involved in a fight?

A Okay.

Q So that's not accurate?

MS. RICE: Objection.

THE WITNESS: No – no, I think that once you – once you do that, I think that you just – might

have just mispronounced your words when you said a fight. I could have said struggle, but at the time, I don't know why I put a fight.

BY MR. CLAFFEE:

Q You can put that aside.

[78] After you and Mr. Blake and Mr. Madigan all ended up on the ground, what happened next?

A The response team arrived, and I know at that time Mr. Blake was – was escorted to medical unit.

Q Do you know who escorted him to the medical unit?

A No, I don't really recall. It was a lot of officers at the time.

Q Do you know why he was escorted to the medical unit?

A Because any time there's any kind of confrontation between an officer and an inmate, you have to – you know, even though they may still – he's going on lockup, he has to go to medical to make sure he didn't sustain any injuries or anything like that.

Q Approximately how much time passed between when Corporal Woodard called for a signal 13 and when the officers arrived?

A It don't take them long – under a minute. It can be anywhere from – all depends on where the

[79] officer is located. So it could be from a couple seconds – I think it never went past a minute, so no matter where you're at.

Q You said it could be anywhere from a couple seconds to a minute. Do you know how long it was?

A No, I don't – I'm just – I mean, I can – say 45 seconds to a minute approximately.

Q Do you wear a watch when you're on duty?

A Yes. I mean, I don't know if I had one on that day, but –

Q Is there a clock in the hallway, in the corridor?

A Yes.

Q Did you look at your watch or the clock at any point?

A No, I don't remember looking at no watch or clock. I don't even know if there was a clock in the hallway at the time.

Q Do you know approximately how long between the first time Mr. Madigan punched Mr. Blake and Corporal Woodard called the signal 13?

[80] A I'm going to say – I mean, everything moved so fast, so I'm sure everything was seconds, I mean under – I'm going to say under a minute.

Q Under a minute between the first hit and when –

A Woodard called the signal 13. Yeah, it was moving pretty fast.

Q After the first hit, Blake told you that Mr. Madigan had hit him; right?

A No, I think Blake told me after the second hit, I believe, I think. Because when he told me that he hit him, I didn't see that – I must was looking toward Corporal Woodard, and I heard him say that he hit him, and that's when I turned around. And that's when –

Q And then you took him and –

A That's when I told him, you know, come on, we going to go to 7 B. And then as we – I think I took him to the floor – I'm getting kind of mixed up, trying to remember it all over again.

Q One step at a time. And so you said "come on, we're going to go." That was after the second [81] hit, you said?

A Yes.

Q Okay. And then at some point, Mr. Madigan asked Corporal Woodard to mace Mr. Blake?

A Right.

Q And you told Ms. Woodard instead to call a signal 13?

A Correct.

Q And all of that happened in under a minute?

A Yeah, it's – it's possible. I mean, it was moving real fast. Everything was happening (indicating) back to back to back to back now, that's it. It was moving pretty fast.

Q It could have taken longer than a minute, though?

A I mean, it could have, possibly. But – it's possible. I mean, I didn't – I wasn't really watching the time.

Q This all took place after you got through the door, the pod door; right?

A Right.

[82] Q How much time had passed between when you went to retrieve Blake from his cell to when you got through the pod door?

A Hmm. I think the whole incident took about four to five minutes.

Q After you observed Mr. Madigan strike Mr. Blake in the face, you said you didn't say anything to Mr. Madigan; is that right?

A Right, I don't think so.

Q Why didn't you say anything to Mr. Madigan?

A Because, I mean, me and him was struggling so much, I guess when – when I noticed that he struck him, it kind of surprised me.

Q Why did it surprise you?

A Because I didn't know the reason why he struck him, because I mean – because if I had a hold of him and I felt as though I was, you know, pretty much had him, I mean, I didn't know why he struck the inmate.

And so right then, I was just like, I guess, kind of shocked even when it happens. And my [83] whole thing then was, okay, well, it happened, let's keep moving, like that.

Q And then Mr. Madigan struck Mr. Blake a second time?

A That's what I heard.

Q Why didn't you say anything to Mr. Madigan after the second time he struck Mr. Blake?

A I'm not sure that – I might have told him I got him again. I'm not sure. But I remember at that time, that's when I decided we going to go to this floor, I'm just going to take control of the whole situation and get this inmate down and show that I have control over this inmate.

Q Did you at any point tell Mr. Madigan to stop striking Mr. Blake?

A I don't believe so.

Q Did you at any point tell Mr. Madigan to stop trying to grab hold of Mr. Blake's arm?

A I remember telling him that I – that I got him, which meant, you know, you can let him go and let me just take full control over him.

Q After the incident was over, you said [84] Mr. Blake was taken to the medical unit?

A Yes.

Q Did – did you seek medical attention immediately after the incident?

A I wasn't – I don't recall if I went to – I'm sure I probably went to Concentra that night or the next day, I'm not really sure.

Q Do you know if Mr. Madigan went to seek medical treatment?

A No, I do not, I don't know if he was injured or anything.

Q Did you speak to anyone immediately after the incident about the incident?

A Well, of course, you have to – after that, you have to write your report, you going to talk to your supervisors.

Q Who was your supervisor?

A I think it was – I don't know the rank at the time, Ms. Peay.

Q Ms. Peay?

A Yeah, I think Cherie Peay. I don't know if she was a captain at that time or major. I can't [85] remember.

Q Approximately how long after the incident did you talk to Ms. Peay?

A Probably 10, 15 minutes, I guess.

Q Where did this conversation take place?

A In – it might have been down on the first floor in her office. I'm not really sure.

Q What did you say to Ms. Peay?

A Supervisor, first thing, she's going to ask what happened. And then once I just explained what happened, she's going to say all right, she's going to say write a report and give her the report.

Q Is that, in fact, what she said, she told you to write a report?

A I really don't know that was her exact words. Only thing I do remember is talking to the warden. I remember talking to the warden in her office about the incident.

Q Was that before or after –

A That might have been – that might have been the next day.

* * *

[102] BY MR. CLAFFEE:

Q So someone must have said something to you?

A Yeah, to spark that – that thought in my head. Because I'm not just going to automatically think that he has the keys to the pod and striking an inmate.

Q So there was a time between your incident and you writing your report where you came in contact with other officers, and there was discussions about the incident?

MS. RICE: Objection.

THE WITNESS: I wouldn't really say discussions. It's – it's like – well, of course every – every officer in there that you pass is going to say something, how did they know you was involved in this signal 13. Everybody is going to be saying stuff. I mean, you can be here, I could [103] be getting my papers to get ready to write it, you're passing the same officer that might have came up, so all you all is one group. So, I mean, somebody could have said something then, I mean.

But I don't have any conversations in my ears just to hear something like that.

BY MR. CLAFFEE:

Q You did pass some officers before you got –

A Oh, I'm sure I passed a lot of officers.

Q But you don't recall which officers?

A Right.

MR. CLAFFEE: I'm going to ask the court reporter to mark this Exhibit Ross 4.

(Ross Exhibit 4 identified.)

BY MR. CLAFFEE:

Q Mr. Ross, do you recognize this exhibit?

A Yes.

Q What is it?

A It's the floor plan for the seventh floor of MRDCC.

Q Does it appear to be a fair and accurate [104] representation of the seventh floor at MRDCC?

A Yes.

MR. SACHSE: What did you say, floor plan?

THE WITNESS: Yes.

MR. SACHSE: Thanks.

BY MR. CLAFFEE:

Q Can you indicate where on this map – can you mark with this red pen with a number 1 where on this map Mr. Blake's cell was when you went to get him.

A I would say approximately here. You said mark with a 1?

Q Yes, please. You can keep that in front of you.

So you reported to Mr. Blake's cell?

A Correct.

Q With Mr. Madigan?

A Correct.

Q And you placed your cuffs on Mr. Blake?

A Correct.

Q And escorted him out of his cell?

A Correct.

[105] Q And right away, Mr. Madigan was trying to grab Mr. Blake's other arm; is that right?

A Yes, once we exited the cell.

Q Once you exited the cell.

A Uh-huh.

Q And Mr. Blake resisted Mr. Madigan's efforts to put his hand on his arm?

A Correct.

Q But you didn't say anything to Mr. Madigan at that point?

A No, not at that point.

Q And you didn't do anything else as a result of Mr. Madigan trying to place his arm on Mr. Blake and Mr. Blake resisting?

A No, because once he tried to place his arm, Mr. Blake resisted, Mr. Blake didn't do anything after that. By the time we was completely outside the cell. And we started towards the steps.

Q And can you indicate on the map with a number 2 which steps you then went down?

A Yes.

Q So approximately how far away from the [106] cell are those steps?

A It's about 8 feet.

Q About 8 feet. So about how long did it take you to get from the cell to the top of the steps?

A A couple seconds.

Q And then you proceeded down the steps, and you were holding on to Mr. Blake's left arm?

A Correct.

Q And Mr. Madigan was slightly behind Mr. Blake?

A Correct.

Q And he was trying to grab Mr. Blake's right arm on the steps?

A That's what I seen once we got toward the bottom of the steps. Because at that time, Mr. Blake had started twisting again like, you know, for – like he did before, when Mr. Madigan touched him at the top of the steps.

Q On the steps, he was twisting?

A Yes.

Q And Mr. Madigan was trying to grab hold of [107] his arm?

MR. SACHSE: Objection.

THE WITNESS: That's what I assumed, I didn't see, that he was trying to do. But that's what I assumed he was trying to do. I didn't see. Mr. Blake was twisting like get off me type.

BY MR. CLAFFEE:

Q And you didn't say anything at that point to Mr. Madigan?

A At that point, I told Mr. Madigan that I got him, that, you know, I could escort him.

Q Mr. Madigan didn't do anything in response or say anything in response?

A No, he didn't say anything at all, not to my recollection.

Q And you didn't do anything else besides tell Mr. Madigan that you got him?

A No.

Q About how long did it take for you to get down that flight of steps?

A A couple seconds.

Q How many steps are there?

[108] A I'll say approximately 12.

Q And where did you proceed after the steps on this map?

A Toward the front door where the officers desk was.

Q And where is the officers desk on this ma'am?

A Put a number 3?

Q You can put a number 3 there, sure. Okay.

And is the door, then, right by where you put the number 3, maybe under the letter E on this map?

A Yes.

Q So then you proceeded through the door. About how long did it take to get from the steps to the door?

A From the steps to the door? It's not going to take long. I mean, a couple seconds.

Q Approximately how far from the bottom of the steps is that door?

A About 30 feet, I guess.

Q It was after you got through that door [109] that you observed the first punch from Mr. Madigan to Mr. Blake, who was on the other side of the door?

A Yes.

Q Can you mark with a number 4 approximately where you were when that first punch took place?

And you observed that first punch; correct?

A Correct.

Q And you didn't say anything to Mr. Madigan after that punch?

A Correct.

Q And you didn't do anything else after that punch?

A I continued to try to get him to go with me to 7 B, I remember that.

Q Continue escorting Mr. Blake by his left arm?

A Right.

Q And after that first punch, you looked away from Mr. Blake and Mr. Madigan?

A Because then, I – it intensified more, I guess, once the punch was thrown. So now – so now, [110] you know, me and him, we were rocking back and forth, and I'm looking toward I guess where I have to be going at the time, toward 7 B, up the hallway. I'm

looking up the hallway and looking back at him at the same time, like that.

Q If Mr. Madigan had just struck Mr. Blake in the face and things were intensifying, why weren't you watching what was going on between Mr. Madigan and Mr. Blake?

A Because I'm – at that time, it's like I'm looking at him but I'm – I mean, everything happened fast, so I'm looking at him and I'm looking at the direction where I'm going at too. And I don't know. I mean, I guess just – my whole goal then was to try to get Mr. Blake to 7 Bravo. Thinking that no further incidents were going to happen.

Q You said earlier that there's a signal, I think you called it a 1025?

A Right.

Q And you said that the difference between that signal and a signal 13 was that a 1025 is when [111] you think something might happen; is that right? Is that accurate?

A Yes.

Q How come you didn't call a signal 1025 after Mr. Madigan struck Mr. Blake the first time?

A I don't know why I didn't call.

Q Did you think that there was a chance that Mr. Madigan might strike Mr. Blake again?

A No, I didn't – no, I wasn't thinking like that, that he was going to strike him again. I wasn't thinking like that.

Q But they were continuing to struggle?

A Yes, all of us, all three of us. Like I say, Mr. Blake was – his whole thing was he didn't want Madigan touching him at all.

Q But Madigan continued to touch him?

A Yes.

Q And you didn't tell Mr. Madigan to stop touching him?

MS. RICE: Objection.

THE WITNESS: No, not at – I don't think not right at that time. I know I told him on [112] different occasions, but I don't recall whether I told him right then.

BY MR. CLAFFEE:

Q Did you tell him on more than one occasion or just that one time on the steps?

A No, I was just telling him, I got him. On the steps. I think I told him another time once we – once we got out into the hallway, I think.

Q When would that have been?

MS. RICE: Objection.

THE WITNESS: My train of thought – I mean, if I said it then, I can't remember if I said it now.

BY MR. CLAFFEE:

Q So then Mr. Blake told you that Mr. Madigan had struck him again; is that right?

A Right.

Q But you didn't see that punch?

A Right.

Q Because you were looking away?

A Right, yeah. Because he told me – I remember hand in front of him, I was waiting – he [113] said he struck me again. That's when I turned around, and I was already looking that way. Then – I mean, I didn't see anything. And that's when we were still struggling. Then that's when he told Woodard to mace him.

Q After Blake said that he hit him again, then were you watching Mr. Blake and Mr. Madigan or were you still looking towards Corporal Woodard?

A I mean, I'm looking everywhere. I'm not just concentrating, I'm not going to look at you, looking at Woodard the whole time. I'm still making contact with the – Mr. Blake too, because me and him was engaged. And I'm trying to get him to focus on me so we can – because I know with me, he was – seemed to be more calmer then, he didn't want no parts of Mr.

Madigan. So I was trying to get him to focus on me, to – you know, let's just go, let's just go toward 7 B, where we had to go.

Q Do you know how many punches were thrown?

A No.

Q You saw one; right?

A Right.

[114] Q And you heard about one?

A I heard one.

Q Could there have been other punches thrown?

MR. SACHSE: Objection.

THE WITNESS: It's a possibility.

BY MR. CLAFFEE:

Q The first time that Mr. Madigan tried to hold Mr. Blake's arm was right after you took Mr. Blake out of the cell; is that right?

MS. RICE: Objection.

THE WITNESS: Right.

BY MR. CLAFFEE:

Q And that was also the first time that Mr. Blake indicated that he didn't want Mr. Madigan holding his arm; is that right?

A Right.

Q Did you get the sense at that time that there might have been something going on between Mr. Blake and Mr. Madigan?

MS. RICE: Objection.

THE WITNESS: I mean, yeah, because he – [115] because he made – Mr. Blake said in his statement, he didn't come up to see what I want the first time, so don't come up now. So right then, I think that he didn't want to see the lieutenant at all, because he thought well, he didn't come up I guess to see whatever complaint he might have had earlier that day, that he didn't want to see him to come lock him up.

BY MR. CLAFFEE:

Q So if a 1025 is called when something might escalate, how come you didn't call it at that first time right after you got out of the cell?

A Because I didn't need to. I mean, you don't just automatically call a 1025. I think that's something if the officer feels as though, you know, they – they can't, you know, handle the inmate or something like that, or inmate might jump on them, so they want us to start on our way up there.

But, I mean, I never felt threatened by Mr. Blake at all so – so it's like I don't – I wouldn't see me calling a 1025, because, I mean, [116] I – I would have had control of Mr. Blake.

Q You would have had control of him if Mr. Madigan hadn't been trying to grab his other arm?

MR. SACHSE: Objection.

THE WITNESS: I think so, because that was his whole – Mr. Blake's whole complaint, you know, toward Mr. Madigan. It wasn't toward me at all.

BY MR. CLAFFEE:

Q So you didn't –

A He agreed that, you know, he was going to let me escort him to lockup.

Q So you didn't make the call then, and you get to the stairs and there's a struggle. Then you get through the door, and Mr. Madigan punches him, and you still don't make any call.

A Right.

Q Why not? Hadn't the incident escalated at that point?

MS. RICE: Objection.

THE WITNESS: But the incident – even though the incident escalated, it's happening – [117] happening real fast. I mean, this incident is taking a couple seconds. And once – you know, once he – once he hit him, I was like, well, let's – you know, it's like he's the lieutenant, I'm the sergeant, let's – let me just keep it going. And he – he said – once Blake said

the second time that he hit him, then he told Woodard to mace him, was like, well, let me just take him to the ground and get some more officers up here, because somebody – it was escalating, to me, at that time.

MR. CLAFFEE: Okay. We're going to stop just to change the tape real quick, go off the record.

THE WITNESS: Okay.

VIDEO OPERATOR: We're off the record. Time is approximately 1:00 p.m. This is the end of tape number 2.

(Recess.)

VIDEO OPERATOR: We are back on the record. The time is approximately 1:06 p.m. This is the beginning of tape number 3.

BY MR. CLAFFEE:

[118] Q Before the break, you said that one of the reasons you didn't feel like the –

MS. RICE: I think we lost Doug.

MR. CLAFFEE: Oh, we did?

MR. SACHSE: No, I'm here.

MS. RICE: Oh. The light went off.

MR. SACHSE: Sorry. Now you did.

MR. CLAFFEE: Doug? Can we go off the record?

VIDEO OPERATOR: We're off the record. The time is approximately 1:07 p.m.

(Discussion off the record.)

VIDEO OPERATOR: We are back on the record. The time is approximately 1:12 p.m.

BY MR. CLAFFEE:

Q Before the break, you had mentioned that one of the reasons that you didn't feel the incident had escalated was because it had all only taken a few seconds. Is that what you said before, one of the reasons?

A Yes, I guess so.

Q Before that, you had mentioned that it [119] took a few seconds to get from Mr. Blake's cell to the top of the steps, that was about 8 feet; right?

A Okay.

Q And then you had to go down –

A Yes.

Q – 12 steps?

A Yes.

Q Right. And then it was about 30 feet from the steps to the desk?

A Yes.

Q And then you had to go through the door and into the corridor?

A Yes.

Q So if it took a couple seconds to just go the 8 feet from the cell to the steps, I'm guessing it took a bit more than a few seconds to go from the cell door to the corridor?

A From the cell –

Q From Mr. Blake's cell into the pod corridor.

A Oh, to come completely out into the corridor?

[120] Q Yeah.

A Yeah, you could still do it all in – you just walk right on out. It ain't going to take – not going to take that long.

Q Could it have taken a few minutes?

A I mean, it could, but I don't think it took a few minutes to get from his cell, escorting him from his cell out into the corridor itself. I mean, because the only hesitation was when I – when I first – when he first came out, and at the bottom of the steps, when he struggled, but that wasn't nothing but him struggling – Blake struggling with me, because Madigan had touched him, and I told to Madigan that I got him. And once Madigan must have let him go because he didn't struggle anymore, we just walked straight to the steps, and I told Officer Fields to move out of the way as we were exiting the door –

Q So Ms. Fields had to open the door?

A No, Ms. Woodard.

Q Ms. Woodard. So the door was closed?

A Correct.

[121] Q And you had to wait for that to be opened?

A Correct.

Q So you had to stop at the door as well?

A I don't recall if I had to really stop, because most of the time if we going on the unit to lock somebody up, the person that's in the hallway is – watches us, watch our back, so Woodard could have been standing at the door, the door had glass where – so she could be watching as I'm coming down, she could have the door – open up the door, so I could just come straight out the pod.

But I don't really recall if I had to stop at the door when she opened it, or as soon as I got to the door, she can swing the door right open. I don't think I knocked on the door, if I had to come down to open it. I don't recall that.

Q You also said that you didn't feel the incident was truly escalating until Mr. Madigan told Corporal Woodard to mace Mr. Blake; is that right?

A Right, uh-huh.

Q So you didn't think it was – you didn't think the first punch that Mr. Madigan threw was an [122] escalation?

A Yeah, it was – it was a escalation. But the way I was thinking at that time was my objective was to get Mr. Blake to 7 B, to lockup. And I think that at that time, I was still thinking you go still – even though he hit him, I still have to get him to lockup. I think that's what – my way of thinking at that time.

And then after the second blow, I probably was still thinking that, but in my mind now, and it's like, no, something is going wrong, let me just – let me just take control of the whole situation, because now that's like it isn't – in my mind, it was just out of hand. And now I know that – let me take Blake to the floor – I think when I said signal 13, because I wanted officers to come up there as fast as they can, not to be on their way, just to get up there, let's end this situation now. I think that was my way of thinking.

Q And you also mentioned that Mr. Madigan was the lieutenant and you were the sergeant.

A Right.

[123] Q Is that one of the reasons why you didn't say anything to Mr. Madigan or do anything after the first punch?

A No, I don't – I don't think – because he was a lieutenant? Because, I mean, I don't know his reasons, what he was – what was really happening on his end of Mr. Blake. I don't know, Mr. Blake could

have been kicking him, because I don't know all his – all Mr. Blake's aggressions was going toward Lieutenant Madigan. So, I mean, I wasn't thinking because –

Q Did you observe Mr. –

A No, what were you going to say?

Q Did you observe Mr. Blake kick Mr. Madigan?

A No, I didn't.

Q And you were still holding his left arm at this point?

A Yes.

Q Why did you feel the need to take Mr. Blake to the floor?

A Because when – once the signal 13 was [124] called, I know that the responding officers are going to be responding and their adrenalin is going to be real high. And I didn't want them to come into a situation that they think that was still uncontrollable, because then they are going to come and he's going to go to the floor.

So I wanted to take Mr. Blake to the floor before they arrive so that they can see that the situation was under – under control in their eyes, once they responded and they – their first view of the incident, of the scene.

Q I believe you also testified earlier that you wanted to show Mr. Madigan that you had Mr. Blake under control. Was that right?

A After taking him to the floor?

Q Yeah.

A That – that could have been possible. For me to just take over the whole situation would have shown Lieutenant Madigan that, you know, the situation is over, he's, you know, on the floor, no threat to nobody, that it's over.

Q So did you take Mr. Blake to the floor to [125] show Madigan that the situation was over or to protect Mr. Blake from the response team?

MS. RICE: Objection; compound question.

THE WITNESS: I think I took Mr. Blake to the floor to end the whole situation, to do everything, just to show, I guess, to Madigan and the response team that, you know, the situation was over. I think that's why I took Mr. Blake to the floor.

BY MR. CLAFFEE:

Q And you ended up on the floor. You were on your left side, and Mr. Blake was on his left side?

A I believe.

Q Were you ever on top of Mr. Blake at any point?

A No, I wasn't on top of Mr. Blake.

* * *

[138] Q I'm just saying, let's go back to page 2 of Ross Deposition Exhibit Number 2.

A Okay.

Q And I think one, two, three, four, five, six – six lines down, you indicate that Madigan was saying to the above inmate, "you will have a hearing but you still have to go on lockup."

A Correct.

Q And you think that was correct?

A Yes.

Q How would you characterize the way this was said by Lieutenant Madigan?

A In a calm manner.

Q Okay. And apparently after that, you went in and put the handcuffs on Inmate Blake after he had packed up his belongings; correct?

A I wasn't – to tell you the truth, I don't know if he packed his belongings up or not.

Q Okay. You don't recall at this point in [139] time?

A Right.

Q All right. But you were the one who put the handcuffs on him?

A Correct.

Q And that was behind his back; right?

A Correct.

Q And then you escorted him out of the cell and towards the steps, if I understand this correctly.

A Correct. Correct.

Q And it was at that point in time at the top of the steps that Lieutenant Madigan grabbed – I guess, was it his right arm, standing behind him?

A Yeah, yeah, Inmate Blake's right arm.

Q I'm sorry, didn't hear that.

A He – Lieutenant Madigan grabbed Inmate Blake's right arm at that time.

Q And that was the point in time when Inmate Blake objected to having Lieutenant Madigan touch him; right?

A Correct.

[140] Q And let me refer you again to Ross Deposition Exhibit Number 2. On the top of page 3, you wrote that Inmate Blake "said 'get the Fuck off of'" – "'get the Fuck off of me.'" Is that your recollection of what he said?

A Correct.

Q So at that point in time, Inmate Blake was not requesting but he was ordering Madigan not to touch him, not to touch him; is that correct?

MR. CLAFFEE: Objection.

THE WITNESS: Yes. He didn't – he didn't want Madigan to touch him at all.

BY MR. SACHSE:

Q Okay. And is that normal procedure that it's up to the inmate to determines who will touch him or who will escort him throughout the prison?

MR. CLAFFEE: Objection.

THE WITNESS: No.

BY MR. SACHSE:

Q Now, you said you started going down the steps. Give me a moment. And as you were going down the steps, was – was the inmate – you [141] indicated at some point in time, and I'm just not sure when, he started getting rather – he was twisting his shoulders and bobbing his head, I believe you said.

How was he acting as you were walking down the steps?

A As we first started walking down the steps, he was – he was pretty calm. Then when we got toward the bottom of the steps, he started twisting. It was my recollection that he was twisting because Lieutenant Madigan had touched him again toward the bottom of the steps in escort –

Q I'm sorry. Not being there makes it a little bit more difficult, I apologize for interrupting.

So there was the little incident at the top of the steps where inmate Madigan told – I mean, I'm sorry, Inmate Blake told Madigan to get the fuck off of me.

A Correct.

Q And then walked down the step – you walked down the steps with Inmate Blake, and there [142] was no incident until at the bottom of the steps; is that correct?

A Correct.

Q And then from your recollection, apparently Lieutenant Madigan again touched Inmate Blake; is that correct?

A Yes.

Q And that's when Inmate Blake became more restless and started twisting and moving his head and shoulders?

A Yes.

Q And according to the statement that you wrote, and I'm looking on page 3, it looks like four lines down, I think that's the point in time where you indicated that Blake said to Madigan, "'get the Fuck off of me Lieutenant sgt. Ross got me you didn't Come talk to me before so don't touch me now.'" Is that correct?

A Correct, even though I didn't see what you read. Correct. That sounded correct.

Q I'm sorry, even though you didn't think what? Didn't hear that.

[143] A I said even though I didn't see what you was reading, correct. That sounds correct.

Q Okay. If you need time, let me know. Like I said, not being there, I can't tell what you're doing or what you're not doing.

MS. RICE: It says 24 at the bottom.

BY MR. SACHSE:

Q Can you describe the inmate for me, Inmate Blake, his size?

A His size?

Q Yeah. Is he – you know, how tall? How heavy is he? How does he compare to Lieutenant Madigan?

MR. CLAFFEE: Objection; compound.

THE WITNESS: I'd describe him about 5'9", about 200 pounds.

BY MR. SACHSE:

Q That's Inmate Blake?

A Yes. Madigan was – he might have been around the same height, but I think Madigan was heavier in weight.

Q Okay. Okay. Now, I think at the bottom [144] of the steps is when you indicated to Lieutenant

Madigan that – that you thought you had him, but that Madigan didn't respond to that; is that correct?

A Correct.

Q And then you've got over to the – you said – let me go check my notes again – that you were walking towards the desk and towards the door, and Inmate Blake started twisting, trying to get away, he was mad and all of his anger was directed towards Madigan; is that correct?

A No, once we got – once we got to the bottom of the steps, he – he – Inmate Blake, he didn't do anything. He walked toward the door to leave the unit.

Q Uh-huh.

A But, I mean, you could tell he was still – you could tell he was still mad at Lieutenant Madigan.

Q Okay. And, again, I'm not trying to tell you what to say. I just have some notes, and I want you to tell me.

[145] A Okay.

Q I have that Inmate Blake started twisting and trying to get away, and he was very mad. Was that before going through the door or after going through the door?

A It was before going to the door.

Q Okay. And as you went through the door, you indicated you were on the inmate's left?

A Yes.

Q And you were looking essentially where you were going and trying to keep hold of the inmate at that time? Did I say that correctly?

A Correct, yeah.

Q Okay. And so you got into the hallway, and you – tell me when you first saw Lieutenant Madigan punch the inmate.

A Right after we exited the – the door, Lieutenant Madigan had grabbed the inmate, Inmate Blake's right arm, and Inmate Blake was really struggling back and forth in –

Q He was very angry that the lieutenant would touch him?

[146] A Yes. And his – and once we took approximately maybe three to five steps, that's when I noticed – I looked at the inmate, and I noticed Lieutenant Madigan had struck him in the face with his right hand.

Q You – Lieutenant Madigan touches Inmate Blake again.

A Uh-huh, yes.

Q And you move three to five steps. And during that three to five steps, were – were you generally looking where you were going?

A I was looking both ways, where I was going and back at the inmate.

Q And back at him.

A Yes.

Q Is it possible that at any point during those three to five steps while you were looking away, that the inmate attempted to headbutt or kick Lieutenant Madigan?

MR. CLAFFEE: Objection.

THE WITNESS: Yes, it's possible.

BY MR. SACHSE:

[147] Q Okay. But you know when you looked back, Lieutenant Madigan punched him?

A Yes.

Q All right. And then tell me – I don't mean to go over it over and over, and I promise this will be towards the end. But what happened after you saw that punch? What did you do?

A After Lieutenant Madigan had threw the first punch, my thought was – my goal still was to get the Inmate Blake to 7 B, which was lockup. And once we started – you know, he was – he was really irate then and, you know, struggling and mad, but all his aggression to me was going towards Lieutenant Madigan.

Q Right.

A And as we were struggling, I remember looking up the hall towards the officer, which was Officer Woodard at the time, and at that time I heard Inmate Blake say that, "Ross, he hit me again."

And that's when I turned toward Blake, and we had – we was like – there's a wall right out [148] there, and we was, like, close to the wall. And I just wanted to focus – since – and he wasn't showing no aggression towards me, I was making eye contact with Mr. Blake to tell him, come on, we going, you know, go to 7 B.

Q Okay. And he – Inmate Blake never, from the time you got him out of his cell, down the steps, into the hallway, showed any aggression toward you, did he?

A No.

Q All of his anger seemed to be directed towards Lieutenant Madigan?

A Yes.

Q And he seemed to be very upset any time that Lieutenant Madigan would touch him. Is that – is that a fair statement?

A Correct.

Q And he told Lieutenant Madigan not to touch him. And I realize he used profanity, but he told him not to touch him on several occasions?

A Yes.

Q Let me just see real quick. I know we've [149] had you sitting there for almost four hours, so I'm going to –

A I'm okay.

Q Yeah, but I'm not.

When you went down on the ground, you said you had told Inmate Blake I'm going to take you to the ground, and he agreed to go to the ground with you; correct?

A Correct. He said okay.

Q He said okay. And then you started going down, but he did not come down with you; is that right?

A No, he came down with me, but we – we had end up falling to the ground rather – both of us, like, just –

Q I was trying to figure out how that happened. I didn't know whether you had indicated that he then refused to go to the ground or whether the two of you just fell or what happened. You tell me.

A I think once I told Mr. Blake that we were going to the ground, he said okay.

* * *

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE, a/k/a SHAMVOY SMITH, Plaintiff,	:	Civil Action Number AW-09-367
vs.	:	
GARY MAYNARD, et al., Defendants.	:	

VIDEO DEPOSITION OF JAMES MADIGAN

Washington, D.C.

Monday, August 29, 2011

* * *

[33] Q Do you recall approximately when that was, that Sergeant Bryant took your cuffs?

A I'm trying to remember. I think it was a little after 2000 – latter part of 2004 maybe.

Q From that point on, you didn't carry handcuffs with you?

A No.

Q And you didn't have any handcuffs on June 21, 2007?

A No, sir.

Q What happened next?

A He said don't touch me as we were going down the steps. It's our job to escort an inmate down steps, arms locked in, and he said don't touch me, and Sergeant Ross had the inmate locked in, but I followed him very closely behind. We were going down the steps, which is, considering the size of the three people involved, very, very cramped, so that's why I would be behind instead of to the side.

Q Why did Mr. Blake say don't touch me to [34] you?

A I have no idea, sir.

Q Were you touching him?

A I was trying to in order to escort him.

Q When did you first try to touch Mr. Blake?

A As we were trying to go down the steps.

Q When there are two officers escorting an inmate, do both officers have to have contact with the inmate?

A If I recall, yes, because that's the way I was taught to escort an inmate.

Q Do you recall when you were taught that?

A I'm trying to remember exactly. I'm trying to remember. I think it was like 1998, 1997, around that time.

Q And who taught you that procedure?

A If I remember, I think at that time was Major Wolf.

Q Are you aware of any written policy or procedure that states that two officers escorting an inmate, both must have contact with the inmate?

A I don't recall reading that exactly, no, [35] sir.

Q Before you tried to touch Mr. Blake, did he appear to be complying with Mr. Ross's escort?

A Yes.

Q You mentioned that the stairs were cramped?

A Yes.

Q Can you describe how you, Mr. Blake and Mr. Ross were positioned going down the steps.

A Going down, facing down in my direction, for example, I was to the left, to the rear. Blake was to my right and Sergeant Ross was to his right and slightly behind.

Q Was Sergeant Ross holding Mr. Blake's arm?

A If I remember, he was.

Q Which of Blake's arms was Mr. Ross holding?

A The right arm.

Q And you were slightly behind?

A I was.

Q What else happened on the steps?

A He continued to yell don't touch me. We [36] continued to walk down the steps.

Q Did you say anything in response to Mr. Blake saying don't touch me?

A I don't recall exactly what I said. All I know is that it was my duty to escort him, and he cannot tell – it's very basic protocol that inmates do not tell correctional staff with whom they're going to comply and with whom they're not going to comply.

Q Did Mr. Ross say anything to either you or Mr. Blake?

A He says Madigan, I got this. He says I got this.

Q Did you say anything in response to Mr. Ross?

A No, I didn't. I was continuing to try to – what I saw was a proper escort.

Q If Mr. Ross told you I got this, why did you continue to try to touch Mr. Blake?

A Because I'm in a supervisory role. I have to comply with rules. In fact, he would had to have complied with any orders if it came to that.

* * *

[41] Q Where was Mr. Ross at this point?

A Mr. Ross was off to the inmate's left. He was behind him.

Q Was Mr. Ross in contact with Mr. Blake at this point?

A I don't recall exactly. It looked likely that he would have been.

Q What happened then?

A The inmate lurched towards me as if he looked like he was getting ready to give me a headbutt, and I wound up hitting him with my fist four times. I had forgotten even that I had the keys in my hand.

Q You had the keys in your hand?

[42] A Yes, sir.

Q How many times did you hit Mr. Blake?

A Approximately four times.

Q Could it have been more than four?

A I don't recall if it had been any more than four times. Any degree of certainty, I would say four times.

Q But it could have been more than four?

A I don't recall it being any more. I think it was very unlikely.

Q What part of your body struck Mr. Blake?

A My fist.

Q Where on Mr. Blake did you make contact?

A His face.

Q Do you recall whether it was his left side of his face or right side of his face?

A I don't recall. The only thing I recall is I hit his face. I wanted him not to headbutt me.

Q What makes you think he was going to headbutt you?

A Because his face was coming to me and looked like a rather quick speed.

* * *

[46] Q What happened after that?

A The only thing I recall is that Sergeant Ross had the inmate against the wall, and he stopped, and I asked lieutenant – I asked Officer Woodard for cap spray.

Q What's that?

A It's Cap-Stun, basically nonlegal force. What happens is it stops an inmate from becoming violent. It's intended to slow the inmate down and to stop resistance.

Q Why did you ask Ms. Woodard for cap spray?

A Because I felt like he was not moving anywhere, offering resistance and instead of thinking to call for further assistance, I called for that, and she told me no.

Q Did she say anything else?

A No, not that I recall.

[47] Q What was Mr. Ross doing at this point?

A He was standing beside the inmate.

Q Did he say anything to you at this point?

A I don't recall him saying anything.

Q Did Mr. Ross say anything to Ms. Woodard?

A I don't recall him saying anything.

Q When you say that the inmate was resisting at the point at which you asked Ms. Woodard for the cap spray, was he resisting Mr. Ross as well as you?

A Yes.

Q What happened next?

A I told him if you go with Sergeant Ross – would you go with him. I don't recall Blake's statement on that one. All I recall is that he said to Ross, he says take me now, and Ross ran towards the inmate and tried to escort him, and he was resisting him, and Woodard called a signal 13. At that time I was close to 7 B, and I ran in towards the inmate and

I knocked him down where I stayed on top of him until help arrived.

Q So you asked Mr. Blake if he would go with Mr. Ross?

[48] A At the end of all this.

Q But you don't recall if Mr. Blake said anything in response?

A Response to me?

Q Yes.

A Not directly to me.

Q Did he say anything in response to anyone else?

A To Ross.

Q What did he say?

A He said take me now.

Q Take me now?

A Yeah. He said that, if I remember, in a sarcastic voice.

Q Mr. Ross ran toward Mr. Blake?

A He took him, and he was – he tried to shake Ross off.

Q How far away from Mr. Blake was Mr. Ross when Mr. Ross had to approach Mr. Blake?

A Approximately 3 feet.

Q How far away from Mr. Blake were you at this point?

[49] A I was about 10, maybe 15 feet.

Q So no one was holding on to Mr. Blake at this point?

A Not that I recall.

Q How did Mr. Blake get away from both of you?

A We were at a standstill at the time. Nobody was moving anywhere.

Q How did Mr. Blake get 10 to 15 feet away from you?

A Because I originally approached Officer Woodard for the cap spray to try to bring the inmate under control.

Q How did Mr. Blake get 3 feet away from Mr. Ross?

A I don't recall if it was quite that far. It looked like they were standing pretty close.

Q You said a few minutes ago he was about 3 feet away?

A I'm trying to recall exactly. I would say that would be fair. 3 feet would be fair.

Q But you don't know how Mr. Ross lost [50] contact with Mr. Blake?

A We walked away a little bit because we were at a standstill.

Q So then you ran towards Mr. Blake?

A No. It was when Sergeant Ross went towards the inmate. It was after then that I ran towards the inmate because he was offering Sergeant Ross resistance.

Q So then after he offered Sergeant Ross resistance, that's when you began towards Mr. Blake?

A Yes.

Q What happened after you ran towards him?

A I fell on top of him. Once he was on the ground and I was on the ground, that was it. I just – my body weight was enough to keep him until help arrived.

Q When you fell on top of him, was Mr. Blake facedown, or was he on his back?

A He was on his back.

Q So you were on top of his chest?

A Not his chest, no, more like his abdomen, his general body area.

[51] Q Were you in contact with any other parts of his body?

A That was it. Of course, if I'm lying down on top of him, that would be from his feet, around his upper abdomen, not directly on the chest.

Q Where were your arms at this point?

A My forearms, if I remember, I think they were on the floor. My left arm was here. It was on the middle of his torso, and the other one was on the floor, if I remember.

Q Where is Mr. Ross at this point?

A I don't recall. If I remember, he was still in the hallway. All's I remember with any certainty, I think generally he was still in the hall. All's I remember with certainty is I stayed on top of the inmate until help arrived.

Q Did someone call for help?

A Officer Woodard sent a corridor officer.

Q Did she call for help on her own, or did someone tell her to call?

A I don't recall.

* * *

[United States District Court, Filed 9/6/11]

Rice, Sarah

From: Rice, Sarah
Sent: Tuesday, August 02, 2011 1:55 PM
To: 'Eisenberg, Emily R.'; dsachse@dtslawoffices.com
Subject: RE: Blake v. Maynard, AW-2367

I would not object if time remained for discovery on any new matters raised for the first time in your amended complaint or if you were amenable to extending discovery as to any new matters first raised in the amended complaint.

From: Eisenberg, Emily R. [mailto:EEisenberg@mayerbrown.com]
Sent: Tuesday, August 02, 2011 1:53 PM
To: Rice, Sarah; dsachse@dtslawoffices.com
Subject: RE: Blake v. Maynard, AW-2367

You have our consent to file an amended answer, provided you do not object to our filing an amended complaint at a later date. Thank you.

Emily R. Eisenberg
T: (202) 263-3828

From: Rice, Sarah [mailto:srice@oag.state.md.us]
Sent: Tuesday, August 02, 2011 1:29 PM
To: Eisenberg, Emily R.; dsachse@dtslawoffices.com
Subject: Blake v. Maynard, AW-2367

Emily and Doug,

I am writing in accordance with Local Rule 103(6)(d) to inquire as to whether you would consent to defendant Ross filing an amended answer.

Best,

Sarah W. Rice
Assistant Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore MD 21202
ph: (410) 576-7005
fax: (410) 576-6955

[Disclaimer Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938, Plaintiff, v. GARY MAYNARD, *et al.*, Defendants.	Civil Action No. AW-09-2367

PLAINTIFF'S CONSENT MOTION FOR LEAVE TO AMEND COMPLAINT

(Filed Sep. 22, 2011)

Plaintiff Shaidon Blake, by his undersigned counsel, hereby moves pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to amend his complaint. In support of his motion, Plaintiff states as follows:

1. On September 8, 2009, Plaintiff filed a complaint, *pro se*, under the Civil Rights Act, 42 U.S.C. § 1983, using a court-supplied form for use by prisoners. Doc. No. 1.

2. On November 19, 2009, Defendant Michael Ross, among other since-dismissed defendants, filed an answer to the complaint. Doc. No. 6. On February 4, 2010, Plaintiff filed a motion for summary judgment, and Defendant Ross, among others, filed a motion to dismiss or, in the alternative, for summary

judgment. Doc. Nos. 17, 18. On September 9, 2010, this Court denied Plaintiff's motion without prejudice, granted summary judgment in favor of two individual defendants, and denied summary judgment in favor of Defendant Ross. Doc. No. 32.

3. On March 14, 2011, Defendant James Madigan filed an answer to the complaint. Doc. No. 53.

4. The Federal Rules allow a party to amend its complaint "with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.*; *see also Forman v. Davis*, 371 U.S. 178, 182 (1962).

5. Plaintiff's complaint was drafted longhand on a standard form, without the assistance of counsel, His proposed amended complaint, attached hereto, is re-formatted to comply with the Local Rules and corrects minor spelling and grammatical errors. Plaintiff's proposed amended complaint also updates his claims to clarify that he is seeking an award of punitive damages in addition to any compensatory damages.

6. In accordance with Local Rule 103(6)(d), undersigned counsel has obtained the written consent of counsel for Defendants Ross and Madigan to file this motion for leave to amend the complaint. Because of the unique format of the original complaint, Plaintiff respectfully requests that this Court grant him relief from the requirement of Local Rule

103(6)(c) that a redline version of the original complaint be filed.

7. More than a month remains in the discovery period agreed to by the parties (*see* Fifth Amended Joint 26(f) Report (Doc. No. 76) (setting deadline for all discovery as October 28, 2011)), and no trial date has been set. Therefore, there is no prejudice to the other parties and this Court as a result of this proposed amendment.

WHEREFORE, Plaintiff respectfully requests that the Court enter an order granting Plaintiff leave to file his amended complaint.

Respectfully Submitted,

DATED:
September 22, 2011

MAYER BROWN LLP
Reginald R. Goeke (13527)
Scott A. Claffee (96077)
Emily R. Eisenberg (95441)
1999 K Street N.W.
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Attorneys for Plaintiff

By: /s/
Emily R. Eisenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938, Plaintiff, v. GARY MAYNARD, *et al.*, Defendants.	Civil Action No. AW-09-2367

PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Shaidon Blake, by his undersigned counsel, for his complaint under the Civil Rights Act, 42 U.S.C. § 1983, against Defendants Michael Ross and James Madigan, hereby alleges and states the following:

STATEMENT OF CLAIM

1. On June 21, 2007 at 6:50 pm while I was being escorted from Unit 7C at the MRDCC (Diagnostic & Classification Center) by Sgt. Michael Ross, I was approached by Lt. James Madigan who, once I was handcuffed behind my back, proceeded to push me. I was headed down a flight of stairs at the time. His actions were unprovoked, so I stated he did not have to push me.

2. Once outside of the unit, Lt. Madigan returned inside to speak with Tier Officer Cpl. Candice

Fields and I was ordered to stand with my right shoulder against the wall until Lt. Madigan returned. I was being watched by Sgt. Ross and I complied with the order.

3. After Lt. Madigan exited the unit, he approached me and, without warning or being provoked in any way by me, started to punch me in the face. Lt. Madigan had a circle key ring gripped in his hands as he pounded me in the left side of my face from overhead approximately 7 times. His force drove my head into the wall several times. After his unprovoked attack, he then proceeded to try and throw me to the ground yelling for me to take a knee. Lt. Madigan acted with callous and reckless disregard for my rights.

4. Over an extended period of time, Sgt. Ross made no attempts to stop the attack despite my repeated pleas for assistance, but the officer assigned to the Hall called for officers' assistance. Sgt. Ross and Lt. Madigan took me to the ground in a violent manner. Sgt. Ross acted with callous and reckless disregard for my rights.

5. Capt. Vincent was one of the first to respond and separated Lt. Madigan and Sgt. Ross from me, and then I was escorted to medical by Captain Vincent.

6. I am in state custody and it was an unprovoked attack. I now live with the results. Therefore, I am now seeking to hold Sgt. Michael Ross and James Madigan responsible for my injuries.

7. Sgt. Ross was responsible for protecting me from attack and injury because he was my escort and I was handcuffed behind my back, so I was rendered defenseless.

8. I am psychologically and physically damaged, and therefore I am under permanent doctors' care and taking medication.

PRAYER FOR RELIEF

9. I, Shaidon Blake, am seeking compensation for pain & suffering, along with extensive medical treatment, and any other relief this court deems proper.

10. I am seeking an Order awarding an appropriate measure of compensatory damages to be determined at trial.

11. I also am seeking an Order awarding punitive damages for Defendants' wrongful conduct, in an amount to be determined at trial.

12. I now suffer from Posttraumatic Stress Disorder and constantly relive my attack, which interferes with my ability to interact with officers. I find it hard to trust any officers and do not like being handcuffed for fear of attack.

13. I am on administrative segregation because my anxiety attacks will not allow me to function properly in general population.

14. I am under the psychiatrist's care and have to take medication twice daily for my condition.

15. This attack has worsened an injury to my head and face that I previously had. I suffer from permanent nerve damage on the left side of my face and severe migraines, for which I take 600 milligrams of Neurontin for the pain.

16. A psychiatrist has prescribed 50 mg Diphenhydramine Hcl twice a day, 5 mg Perphenazine twice a day and 60 mg of Prozac once a day. These medications are to treat anxiety attacks, depression, and Posttraumatic Stress Disorder.

JURY TRIAL DEMAND

17 Plaintiff demands a trial by jury for those claims so triable.

Respectfully Submitted,

DATED:
September 22, 2011

MAYER BROWN LLP
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Attorneys for Plaintiff

By: /s/
Emily R. Eisenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

SHAIDON BLAKE a/k/a
SHAMVOY SMITH #343938

Plaintiff,

vs.

GARY MAYNARD, et al.

Defendants.
/

Civil Action No.
8:2009cv02367

The deposition of SHAIDON BLAKE was held on Tuesday, September 27, 2011, commencing at 10:20 A.M., at the Offices of Maryland Reception Diagnostic and Classification Center, 550 East Madison Street, Baltimore, Maryland 21202, before Louis C. Peppler, Notary Public.

* * *

[12] Q Did you attend an inmate orientation?

[13] A Inmate orientation, can you describe that, because we might call it something else?

Q Were you shown an orientation video?

A No.

Q Were you given any information about services that are available to inmates?

A PSA. That's what this is for PSA, yeah.

Q What does PSA stand for?

A Professional Service Area.

Q Was that a formal introduction to the PSA?

MR. CLAFFEE: Objection. Vague.

Q Well, how were you told about the PSA?

A This is a classification. That's it, to that extent only.

Q Did you receive any written material?

A Inmate handbook.

Q Were you transferred to MDCI?

A Yes.

Q What happened when you arrived at MDCI?

MR. CLAFFEE: Objection. Vague.

Q Were you given a medical exam at MDCI?

[14] A Upon request.

Q Were you given a mental health examination at MDCI?

A Yes.

Q Were you prescribed any medication when you arrived at MDCI?

A Yes.

Q What medication were you prescribed?

A Celexa, something like that.

Q Was that the only medication?

A Neurontin.

Q Why were you prescribed Celexa?

A Celexa was for – I really don't know. I don't know.

Q Why were prescribed Neuronin?

A Head problems.

Q When you arrived at MDCI, did you attend any orientation?

A No.

Q Was there any time when you were informed of the facilities available to MDCI, or the rules about [15] inmate conduct?

MR. CLAFFEE: Objection. Compound.

Q Did you attend a presentation about the rules of inmate conduct when you first arrived?

A No.

Q Were you given a copy of the inmate handbook?

A Yes.

* * *

[22] Q Who is James Madigan?

A He was the lieutenant that was involved in this incident with me.

Q When did you first met Mr. Madigan?

A June 21st. This day, June 21st.

Q You had never met Mr. Madigan before the incident?

A I never seen him.

Q Did you see him after the incident?

A No.

Q Let's talk about June 21st, 2007 Were you involved in a disagreement with another inmate on housing unit 7 that day?

A No.

Q Were you given a notice of infraction?

[23] A Yes.

Q What was the notice of infraction about?

A Ms. Fields wrote a ticket saying that I was disturbing her unit.

Q Why did she do that?

A I have no idea. She's got no purpose. There was no reason.

Q What did she say the disturbance was?

A The telephone and the T.V.

Q What did she say about the telephone?

A She said I was using the phone and it wasn't my phone time.

Q Did you have any interaction with the phone that day? Did you try to use the phone that day?

A Yes.

Q What happened?

A She came and tapped me on my shoulder and told me to get off the phone.

Q Was it your allotted phone time?

A It was my recreation time, yes.

Q Is there a list that's kept on the unit?

[24] A Sure, yes.

Q For who can use the phone?

A Yes.

Q Were you next on the list?

A Yes. I was on the list, but my name had got passed by. It had passed.

Q Then what happened? What happened when you went to use the phone? How did you get the phone if your name had already been passed by?

A It was a friend of my mine's phone time.

He gave me his phone time, so I used it then.

Q What did Ms. Fields say about the television?

A She said I was commandeering the television. She told the lieutenant that I was commandeering the television or something.

Q Were you commandeering the television?

A No.

Q You said Ms. Fields tapped you on the shoulder when you were trying to use the telephone; is that right?

[25] A Yes.

Q Then what happened?

A I kept using the telephone. She walked away.

Q What happened after you got off the phone?

A I didn't. It was Sergeant Ross at the time and Sergeant Tawn Davis came in and asked me to lock-in.

Q Did you lock-in?

A Yes.

Q What cell were you in?

A I don't recall.

Q What happened after you locked-in?

A Shortly after, Lieutenant Madigan and Sergeant Ross came to my cell.

Q What happened when they came to your cell?

A They came to my cell and told me to pack up. I was going to lockup.

Q Who told you?

A Lieutenant Madigan.

Q Then what happened?

[26] A Well, after he told me I was going to lockup, I had a question. I said why? I didn't understand why.

Q Did anyone tell you why?

A Yes, Madigan did.

Q What did he say?

A He said because you're a bad ass and you're commandeering the T.V., taking over the unit.

Q Then what happened after that?

A I said I don't know what you're talking about. I referred him to a dude that was sifting in front of the T.V., plus the dudes that were there to question.

Q You thought that this other inmate was commandeering the T.V.?

A No. I was referring the lieutenant to the people who were watching the T.V., so he could question them and ask them what was happening. I don't watch T.V.

Q Was your cell door open?

A Yes.

[27] Q What happened after you asked Lieutenant Madigan to talk to the other inmates?

A He didn't want to hear it. He got the cuffs from Ross and told me to cuff-up, pack my stuff up and cuff-up.

Q Then what happened?

A I packed my things and I cuffed-up.

Q Who placed the handcuffs on you?

A I don't remember exactly who did it.

Q Were you handcuffed in the front or in the back?

A Behind me.

Q Were you still inside your cell when the handcuffs were put on?

A Yes, because I had a big old bag in my hands with my property. I had a big trash bag full of property.

Q What happened after you were handcuffed?

A Well, I was carrying this big bag behind my back. Sergeant Ross was on my right, or had one of my sides and I had to go down the stairs.

[28] Q You said Sergeant Ross was on one of your sides. Did you mean that he was touching you?

A Yes.

Q How was he touching you?

A In the escort holding my arm (indicating).

Q You're touching your upper arm; is that right?

A Yes.

Q Just so that I am clear. You said you don't remember which side Ross was on?

A No, I don't remember.

Q Then you said you came outside of your cell; is that right?

A I stepped out and then he grabbed my arm.

Q Then what happened?

A As I'm carrying this big bag behind my back going down the stairs, Lieutenant Madigan shoved me from behind.

Q How were you and Lieutenant Ross positioned on the stairs?

A We were side by side.

[29] Q Mr. Madigan was behind you?

A Behind me.

Q Did you say anything?

A After he pushed me, I did.

Q What did you say?

A I said don't fucking push me. Excuse me.

Q That's okay. Did Mr. Ross say anything?

A Yes, he did.

Q What did he say?

A He said, Lieutenant, I got him. He's all right.

Q What happened after that?

A I made it down the stairs. A short distance to the corridor door, we walked outside the door.

Q How was Mr. Madigan positioned with respect to you and Mr. Ross?

A He trailed behind us, shortly behind us, I mean the whole time until we got outside.

Q Until you got outside?

A Yes.

[30] Q So, you and Mr. Ross were – because he had his hand on you this whole time; is that right?

A Excuse me.

Q Lieutenant Ross, did he still have his hand in the escort grip while you were walking?

A Yes.

Q Until you got outside?

A Yes.

Q And Madigan was trailing slightly behind you?

A Yes.

Q What happened after you got outside?

A He told me to put my shoulder on the wall and stand there and wait. He went to the pod door and talked to Candice Fields, Lieutenant Madigan did.

Q So, who told you to stand by the wall?

A Lieutenant Madigan.

Q Where was Sergeant Ross?

A Holding my arm.

Q Was he between you and the wall?

A No.

[31] Q So, he was holding your arm, and then you were standing, and then there was the wall; is that right?

A He was side by side to me, inches, and then the wall. I'm on the wall, flat against the wall, and he was inches away from me.

Q So, was he holding you still?

A Yes.

Q Which way were you facing?

A I was facing the pod door that I just exited.

Q So, you were facing back towards 7C?

A 7C.

Q Could you see into the pod?

A Yes, the door was open.

Q Did you hear Mr. Madigan and Ms. Fields conversation?

A No.

Q Did anyone say anything else while you were standing there?

A I don't understand what you mean.

[32] Q Did anyone say anything during this time when you were standing by the wall?

A Not to me.

Q Did you say anything?

A No.

Q What happened after that?

A Lieutenant Madigan came out of 7C corridor and came in my face. He had the keyring on his hand and he started pointing in my face yelling and cursing at me. Then that's when he punched me in my face like three or four punches, then he stopped for a second and then started back up again.

Q What did Mr. Madigan say?

A He said this is not fucking California.

Excuse me. This gang shit is not going to work here, then he started punching me in my face.

Q You were standing at the time?

A Yes.

Q Did Mr. Madigan touch you at all other than the push before he punched you?

A No.

[33] Q Where was Sergeant Ross?

A He was basically to my side. He was holding my side just standing next to me.

Q You were stationary at the time?

A With my shoulder on the wall.

Q What happened after that?

A I was given a directive to take a knee.

Q Did you?

A No.

Q What did you do?

A I stood with my shoulder on the wall.

Q What happened after that?

A Lieutenant Madigan ordered the corridor worker, Ms. Woodard to Mace me.

Q What happened then?

A After the order?

Q After the order.

A She refused.

Q Did anyone else say anything?

A I don't remember.

Q Do you remember what happened next?

[34] A Okay. Lieutenant Madigan and Lieutenant Ross grabbed me and threw me to the ground.

Q Were you still standing against the wall?

A Yes.

Q Did Sergeant Ross still have you in an escort grip?

A I don't understand. Can you tell me again?

Q Okay. Did Sergeant Ross have you in an escort grip this whole time?

A The whole time I was hit in the face?

Q Yes.

A Yes.

Q Did he still have you in an escort grip after Lieutenant Madigan ordered Ms. Woodard to Mace you?

A Yes, he still had ahold of me.

Q Did he always have you in an escort grip?

A Yes.

Q How did Mr. Madigan grab you?

A He kind of pulled me forward, and then grabbed me by the side of my pants, and Ross grabbed [35] the other side.

Q How did Ross grab the side of your pants?

With what hand?

A I don't know what hand.

Q Was it with one hand?

A I don't remember.

Q Was he still holding your arm?

A I don't remember.

Q So, they grabbed the side of your pants and then what happened?

A Dumped me to the ground.

Q How did they do that?

A My feet came from under me and I hit my head. He dumped me on my head.

Q So, you fell forward?

A No, I fell backwards.

Q You fell backwards?

A Yes.

Q So, up until this point, you were standing with your arm against the wall?

A Yes.

[36] Q Did you ever move off of the wall?

A No.

Q What happened after that?

A At what point are we at now?

Q What happened after you were dumped on your back?

A Ms. Woodard called for someone to come help. He dropped his knee on me. Ross dropped his knee in my chest. There was just a bunch of, I don't know, just mayhem, so I don't really recall, because everybody came running off the elevator.

Q When did Ms. Woodard call for the other officers?

A Shortly after she refused a direct order and I was dumped on my head.

Q Did anybody else say anything before she called for the officers?

A No.

Q What happened after the officers arrived?

A Well, Captain Vincent grabbed them off of me, because Ross and Madigan were on me. Both of them [37] had me.

Q Both of them were on top of you?

A Yeah, both of them had me at this time when they came.

Q You said before that Ross had his knee on your chest.

A Yes, he dropped his knee on my chest.

Q How was Madigan on top of you? When did he get on top of you?

A In a restraint. In a spring type motion, manner, I guess, he dropped his knee in my chest, Ross did, and I guess he's like standing on the side of me or whatever.

Q So, Ross has his knee on top of your chest and then Madigan is holding your shoulders down?

A Like restrained, being restrained.

Q But, they're both standing over you?

A Yes.

Q How far down the corridor were you?

A Approximately, ten feet from the 7C door.

Q Where would that be in relation to the [38] elevators?

A Approximately, 20 feet from the elevators, 20 or 30.

Q So, you were in between the elevators and the 7C door?

A Yes.

Q So, what happened after Captain Vincent arrived and Sergeant Ross and Lieutenant Madigan were no longer on top of you?

A I was escorted to an elevator down to the next unit.

Q What happened there?

A First, I was put in a holding tank.

Lieutenant Joyner was talking to me. Then from there, I was taken to medical to be seen.

Q What did Lieutenant Joyner talk to you about?

A He just asked me was I all right.

Q Were you all right?

A No.

Q What was wrong?

[39] A I had just gotten beaten up. I was upset. I was hurt. I was feeling bad.

Q What hurt?

A My head hurt. My face hurt. My face was swollen up.

Q What happened after you went to the medical unit from the holding cell?

A After I went to the medical unit?

Q At the medical unit. So, you were in the holding cell speaking to Lieutenant Joyner; is that right?

A Yes.

Q Then you went to the medical unit?

A Yes.

Q What happened there?

A Well, they were doing a preliminary examination on my face and things to see was I hurt. They gave me Tylenol. It was full of police officers in there. I asked them to take me to my cell, take me upstairs.

Q Did you sign a release form?

[40] A Yes, I did.

Q Why did you sign the release form?

A Because I didn't want to be down there.

There were 20 police officers approximately packed in this little room. I mean, six by nine. I just had to get out of there.

Q Who were the officers?

A It was so many I don't recall.

Q Do you remember any of them?

A One of them was Lieutenant Joyner.

Q Is that the only one you specifically remember?

A Yes.

Q Why were the officers there?

A It was a code. It was a response code.

They were all just there, I can assume after that.

Q Did they follow you to medical?

A When I came out of that holding cell, I seen a hallway full of police officers. Every police officer available was there.

Q Were they the same officers that were at [41] the scene?

A No, I don't recall that.

Q Were you still in pain when you returned to your cell?

A Yes.

Q Did you ask to be seen by medical after you returned to your cell?

A I don't recall.

Q Do you remember the next time that you were seen by medical?

A The sick call nurse that comes through with the medication cart.

Q What medication did you receive? Do you remember?

A First, it was just Motrin.

Q Did you tell the sick call nurse that you were still in pain?

A Yes.

Q Did you write a sick call slip?

A I don't recall.

Q Did you see anyone other than the sick call [42] nurse?

A Captain Vincent.

Q Why did you see Captain Vincent?

A He was the guy that responded first and came in asking me questions.

Q Did he ask you questions about the incident?

A Yes.

Q Did you write a statement?

A Not with Captain Vincent, I didn't.

Q Did you write a statement at any time?

A Yes.

Q When did you write the statement?

A That was about 20 or 30 minutes after I was put in my cell for segregation.

Q Had you spoken to anybody before you wrote the statement?

A Briefly with Lieutenant Joyner down in the holding cell.

Q Would you say that the statement that you wrote then was accurate?

[43] A It was accurate, yes.

Q When did Captain Vincent come to talk to you?

A Captain Vincent came up at about maybe 15, 20, 30 minutes afterwards.

Q Do you remember what he asked you about?

A He asked me about the incident that occurred.

Q Did anyone come to talk to you about the incident after Captain Vincent?

A Captain Cruz.

Q Who is Captain Cruz?

A That's who assigned me to administrative segregation. He came in to bring the paperwork for it.

Q Were you told why you were assigned to administrative segregation?

A Yes.

Q Why?

A Pending an investigation in the assault.

Q Did anybody else come to talk to you?

A Yes.

[44] Q Who else?

A Intel.

Q Did you speak with the investigator?

A Briefly.

Q Do you remember what you spoke about?

A The incident.

Q What did you tell them about the incident?

A The same thing I wrote in the report.

Q At that time, did you ask that the investigation be closed?

A No.

Q Did you ever ask that the investigation be closed?

A I didn't ask anything.

Q Did you sign a statement asking that the investigation be closed?

A I didn't sign anything asking for the investigation to be closed.

MS. RICE: Mark that.

(Mr. Blake Deposition Exhibit 1 was marked for purposes of identification.)

[45] Q Do you recognize this document?

A It's got my signature on it.

Q Do you remember signing it?

A Vaguely, yes.

Q Do you remember why you signed the document?

A Because I was told that there was an investigation going on, that it was being handled, so I said okay.

Q Did you read the document before you signed it?

A I was in handcuffs. This wasn't in MRDCC. This was months later and I was in handcuffs.

Q So, when you said that Intel came to visit you, was that at MRDCC?

A Yes.

Q When did Intel come to visit you?

A Maybe three days to a week after the incident.

Q Where were you when you signed this document?

[46] A Cumberland, Maryland, North Branch Correctional Institute.

Q Had an investigator come to visit you again?

A No.

Q Who asked you to sign the document?

A A dude from outside the investigation talked to me or something and it was over the phone.

Q Do you know whose signature this is on the witness line?

A Lieutenant Thomas, North Branch Correctional Institute.

Q Are there two different signatures here?

A The top guy was who I spoke to over the phone. This is a fax.

Q You spoke to him over the phone. What did he say to you?

A He said it's being investigated. He couldn't inform me what's going on, but it's being investigated.

Q What did he tell you the purpose of this [47] form was?

A He just said he needed the form.

Lieutenant Thomas asked me to sign the form.

Q Did you read the form?

A I guess I did. I don't recall.

Q Have you read the form now?

A Yes, I have.

Q What does the form say?

A It says "I, Shaidon Blake, 343938 have been involved in an incident that was reported to the Department of Public Safety and Correctional Services Internal Investigative Unit. I am now requesting that no investigation be conducted. By signing this statement, I am requesting that no further investigative action be taken on this complaint and that the matter be considered CLOSED. This statement is being signed freely and voluntarily with no threat or coercion being used against me to sign this statement."

Q So, you said your understanding was that the investigation would continue after you signed this [48] form?

A Yes.

Q Do you know what the outcome of the investigation was?

A The guy said internal investigation. He can't inform me.

Q Was there a request for administrative remedy?

A Was there a request for? I don't understand what you mean.

Q Do you know what a request for administrative remedy is?

A I don't want to assume we're talking about the same thing.

Q Within the Department of Correction, what does that term mean?

A Are you speaking about grievances?

Q Well, an ARP. What is an ARP?

A ARP, you send that to the warden or whatever and the warden will take care of something for you.

[49] Q Did you file an ARP about this incident?

A No, the warden did. The warden instantly jumped in and involved himself.

Q But, you didn't file an ARP about this incident?

A No. It was dealt with internally. The ARP is if you want to get their attention, to get them to react to your situation.

Q Have you ever filed an ARP?

A No.

Q Did you file any grievance about this incident?

A It's the same thing.

Q With the Inmate Grievance Office?

A No.

Q Why not?

A Because it was handled. The warden instantly got an investigation going. That's what it's for.

Q Have you ever read the Division of Correction directives about the administrative remedy [50] procedure?

A No.

Q What about the Inmate Grievance Office, directives about the inmate grievance procedure?

A No.

* * *

[90] Q Where was Ross during the punching?

A Right next to me, inches.

Q Could Ross see the punches?

A Yes.

Q Who asked you to take a knee after the punches?

A I think it was Madigan.

Q Why didn't you take a knee?

A Because I was being beat up.

Q How many officers responded out of the elevator?

A There may have six or seven.

Q How many officers were in the medical unit after the incident?

A Over 20.

Q So, were there different officers in the [91] medical unit than outside of the elevators?

A Yes.

Q Why do you think there were so many officers in the medical unit?

MR. SACHSE: Objection.

THE WITNESS: There was a code being called and an officer was involved.

Q I believe you testified that before this incident, you weren't on Neurontin. But, you were placed back on it after this incident; is that right?

A I think so.

Q When you went on Neurontin after this incident, your dosage was higher than any previous time you were on Neurontin?

A Yes.

Q When you signed this Exhibit 1, did you know that Madigan had been terminated?

A Just rumor.

Q No one formally told you about Madigan's termination; is that right?

A No. Actually, they said they couldn't tell [92] me anything about the investigation.

Q But, you heard from somewhere else that he had been fired?

A Yes.

Q You testified that on the stairs, Ross said to Madigan I got him; is that right?

A He said I got him. He's okay.

Q Did Ross say anything else to Madigan at any other time throughout this incident?

A No.

Q Did Ross do anything to stop Madigan from punching you?

A No, he didn't.

Q Did he say anything to Madigan after he punched you?

A No.

Q What could Ross have done after Madigan punched you?

MS. RICE: Objection.

Q You can answer, if you remember my question.

[93] A No, I don't.

Q What could Ross have done differently after Madigan punched you? I'm sorry, not differently. What could Ross have done after Madigan punched you?

A He could have got between us and stopped it.

Q Is there anything else he could have done?

A He could have called for a code for assistance.

Q Do you know if any disciplinary action was taken against Ross as a result of this incident?

A I don't know. He told me he couldn't tell me nothing.

Q So, you couldn't have known if any action had been taken?

A No.

MR. CLAFFEE: I think that's all the questions I have. I would like to say for the record that we want to assert our right and correct the transcript.

(Deposition concluded at 12:05 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHAIDON BLAKE aka SHAMVOY SMITH, #343938	*	
Plaintiff,	*	Civil No. AW-09-2367
v.	*	
GARY MAYNARD, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

ANSWER TO AMENDED COMPLAINT

Defendant Michael Ross, through counsel, answers the plaintiff's amended complaint as follows:

1. Defendant admits that on June 21, 2007, at the Maryland Reception, Diagnostic and Classification Center, he was involved in escorting inmate Shaidon Blake, #343-938, from Unit 7C to Unit 7B, and that during this escort they descended the stairs. Defendant has insufficient information to admit or deny the remaining allegations as to Lieutenant Madigan, and therefore denies them.

2. Defendant denies this allegation.

3. Defendant admits that he witnessed Lieutenant Madigan punch the plaintiff in the face more than one time. Defendant has insufficient information to admit or deny the allegation with respect to

the key ring in Lieutenant Madigan's hand, and therefore denies it. Defendant denies the remaining allegations contained in this paragraph.

4. Defendant denies the factual allegations in this paragraph and states that the legal conclusions do not require response, however, to the extent a response is required, defendant denies all allegations in this paragraph.

5. Defendant admits that plaintiff was escorted to medical immediately following the incident. Defendant has insufficient information to admit or deny the remainder of the allegations in this paragraph, and therefore denies them.

6. Defendant admits plaintiff was in state custody on June 21, 2007 The remainder of the paragraph contains legal conclusions to which no response is required, however, to the extent a response is required, defendant denies the remainder of the paragraph.

7 This paragraph consists of legal conclusions to which no response is required, however, to the extent a response is required, defendant denies the allegations.

8. Defendant denies that plaintiff's pre-existing mental conditions were worsened by the incident. Defendant has insufficient information to admit or deny plaintiff's claim that his pre-existing physical conditions were worsened by the incident, and therefore denies all such allegations.

9. Plaintiff's request for relief is not an allegation for which answer is required. To the extent an answer is required, defendants denies that plaintiff is entitled to the requested relief or to any relief whatsoever.

10. Plaintiff's request for relief is not an allegation for which answer is required. To the extent an answer is required, defendants denies that plaintiff is entitled to the requested relief or to any relief whatsoever.

11. Plaintiff's request for relief is not an allegation for which answer is required. To the extent an answer is required, defendants denies that plaintiff is entitled to the requested relief or to any relief whatsoever.

12. Defendant denies these allegations.

13. Defendant denies these allegations.

14. Defendant admits that plaintiff is prescribed 600 mg of Neurontin to be taken orally twice daily. Defendant otherwise denies the allegations contained in this paragraph.

15. Defendant denies the allegations contained in the first sentence. Defendant admits that plaintiff suffers from nerve damage on the left side of his face and migraines and that he is prescribed 600 mg of Neurontin, but otherwise denies any remaining factual allegations contained in this paragraph.

16. Defendant denies these allegations.

DEFENSES

1. Defendant denies every allegation in plaintiff's amended complaint not expressly admitted.

2. The plaintiff's amended complaint fails to state a claim for which relief may be granted as to defendant Ross.

3. Each and every act and action of the Defendant taken with respect to the Plaintiff was done and performed in good faith, in the official discharge of his duties as an employee of the State of Maryland, and with a reasonable belief as to the constitutionality of his actions for which he enjoys a qualified immunity from liability.

4. Plaintiff's claims are barred because defendant enjoys qualified immunity from suit.

5. Plaintiff's claims are barred by failure to properly exhaust all administrative remedies available to him as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

/s/

SARAH W. RICE
Assistant Attorney General
Federal Bar No. 29113
St. Paul Plaza – 19th Floor
200 St. Paul Place
Baltimore, Maryland 21202

(410) 576-6416 (Telephone)
(410) 576-6880 (Telefax)
E-mail: swrice@oag.state.md.us

Attorneys for Defendant

[United States District Court, Excerpt of Exhibit 1 to Lieutenant Michael Ross's Motion for Summary Judgment, filed Jan. 9, 2012]

MARYLAND DPSCS
GENERAL MEDICINE CHRONIC CARE CLINIC
FACILITY: Maryland **SITE: BCBIC**
COMPLETED BY: **12/27/2006 1:55 PM**
Gregory Ross, MD

General Medicine Chronic Clinic Enrollment Date: 07/09/2006

Subjective

34 yo BM seen for numbness and pain on left side of head and face. History of trauma to head injury 6/5/06 from fall. He had CT of heand which was negative. He has been approved for neurology consult. He stated that aspirin and motrin has affected his stomach. Also, pt c/o pruritic rash on arms.

Objective

Vital Signs

Temp: 98.00 (oral) Resp: 16 Pulse: 75 method: electronic BP: 123/81 (sitting, L arm, cuff: regular) Time taken: 1:56 PM
Weight change: none
Ideal wt: 0 lbs. Body Mass Index (BMI): .00
Height: 5 feet 8 inches

WD, BM in NAD. Neuro: decrease light touch on left side of face and head. A&O x 3. Motor intact. Skin: Dry scaly rash on the left upper arm and elbow.

Assessment

If any unresolved diagnoses have been recorded for this patient, they appear below:

ICD9 Code	Description	Onset
307.81	Headache, Tension	07/09/2006
054.0	Eczema Herpeticum	12/27/2006

Diagnosed	Severity	Status	Notes

Previous visit information:

Last degree of control: FAIR, assessed on 07/09/2006

Last status: unchanged, assessed on 07/09/2006

1. Neuropathic pain. Pt has been approved for neurologist consult. Pending consult will give a trial of Neurontin 300 mg bid.

2. Eczema

Plan

Medication Plan – if any active medications have been recorded for this patient, they appear below:

generic name	brand name	dose	sig desc	start date	stop date
Triamcinolone Acetonide	Kenalog	0.025%	apply topically to affected area twice per day	12/27/ 2006	01/27/ 2007
Gabapentin	Neurontin	300mg	take one capsule by mouth two times per day	12/27/ 2006	

1. Neurontin 300 mg bid.
2. Neurology consult.

NAME: blake, emmanuel
NUMBER: 992203362
D.O.B. [redacted]

[United States District Court, Excerpts of Exhibit 8 to
Lieutenant Michael Ross's Motion for Summary Judgment, filed Jan. 9, 2012]

Department of Public Safety & Correctional Services
Internal Investigative Unit
Criminal Investigation Report

1. Inmate's Name (Firm Name of Business) Last, First, Middle **BLAKE, Sheldon Inmate DOC#343-938**	3. Complaint Control Number CIR 0 7 3 5 0 0 8 6 8 8. General Broadcast Date & Time ☐ YES ☑ NO NA
4. Victim's Residence Address City **MD Recep-Diagnostic & Class. Center 550 E. Madison Street, Balt MD 21202**	2. Victim's Sex, Race, DOB F/B; [redacted]
6. Victim's Employer or School Attends City **NA**	5. Residence Phone 410-879-3500
	7. Business Phone NA

8. **COMPLAINANT OTHER-VICTIM-WITNESS-PARENT- V=VICTIM** (Other than in Item #1 Above); **C=COMPLAINT; P=PARENT/GUARDIAN**

9. Name (Last, First, Middle)	Code	Sex-Race-DOB	Residence Phone	Business Phone
VINCENT, Calvin-Captain		**M/B**	**NA**	**410-879-3500**
Residence Address City **Maryland Reception-Diagnostic & Classification Center 550 E. Madison Street, Balt MD 21202**				
10. Name (Last, First, Middle) **N/A**	Code	Sex-Race-DOB	Residence Phone	Business Phone
Residence Address City				

11. Crime	12. Weather	13. Date & Time Occurred	14. Day	15. Date & Time Reported
Assault	**N/A**	**6/12/07; 2150 Hours**	**Thursday**	**6/22/07; 2132 Hours**

16. Location of Crime (Address)
Male adult Correction Facility

17 Location of Offense or Type of Premise			
Housing Unit Charlie	Co. **BC**	MU	18. Sector No.

19. WAS THERE A WITNESS TO THE CRIME? ☐ NO ☑ YES

20. No. 1 Witness or Neighborhood Check (Last, First, Middle)	Sex-Race-DOB	Residence Phone	
FIELDS, Candis COII	**F/B**	**NA**	☐ INTERVIEWED
Location/Address **MD Recpt. Diagnostic & Class. Center 550 E. Madison Street Balt. MD 21202**		Business Phone **410-879-300**	☑ STATEMENT TAKEN

20. No. 2 Witness or Neighborhood Check (Last, First, Middle) **WOODARD, Latia**	Sex-Race-DOB **F/B**	Residence Phone **NA**	☐ INTERVIEWED
Location/Address **MD Recpt. Diagnostic & Class. Center 550 E. Madison Street Balt. MD 21202**		Business Phone	☐ STATEMENT TAKEN

21. SUSPECT ☑ NAMED ☐ KNOWN ☑ IDENTIFIED ☐ PREVIOUSLY SEEN ☐ DESCRIPTION ☐ NO ☑ YES						
Name (Last, First, Middle) **MADIGAN, James-Lieutenant**	Alias	Sex-Race-DOB **M/W** [redacted]	Height **NA**	Weight **NA**	Hair **NA**	Eyes **NA**
Location Address **MD Recpt. Diagnostic & Class. Center 550 E. Madison Street Balt. MD 21202**			Residence Phone **N/A**			BI # **N/A**
22. Name (Last, First, Middle) **NA**	Alias	Sex-Race-DOB **NA**	Height **NA**	Weight **NA**	Hair **NA**	Eyes **NA**
Location Address **NA**			Occupation Employer			BI #

23. SUSPECT VEHICLE ☐ STOLEN ☐ RECOVERED ☐ OTHER ☑ NO ☐ YES									
24. Vehicle Info **N/A**	Color	Year	Make	Model	Body Style	Reg. Year	Reg. State	Reg. No.	Vin #

25. ☐ SIGNIFICANT M.O., OR ☐ LIMITED OPPORTUNITY TO COMMIT THE CRIME? ☑ NO ☐ YES		
26. Mode of Operation **N/A**		
27. ☐ Scene Processing ☐ N/A Explain ☐ Photo ☐ Fingerprinting ☐ Other	Crime Lab ☐ Yes ☑ No	Crime Lab Tech.
28. WAS THERE ☑ TRACEABLE PROPERTY ☑ PHYSICAL EVIDENCE ☐ NO ☑ YES		

31. Property Insured, By Whom? **N/A**	30. Instrument, Force, Weapon **NA**	Handgun Used? ☑ NO ☐ YES
31. Property Stolen/Damaged – Item No. 1 **N/A**		Identification No.
		Value
31. Property Stolen/Damaged – Item No. 2 **N/A**		Identification No.
		Value

32. If Property Recovered Was Owner Notified? ☐ YES ☐ NO	33. How Notified (If by Miles – Give Message No., File, Originating Station & Date) **N/A**	34. Total Loss Value **N/A**

35. Vehicle from Which Make Reg. No. State Year occurred	STOLEN VEHICLE AND UNAUTHORIZED USE ONLY, COMPLETE ITEM 36.-43.	39. Vehicle Identification No. N/A

37. Registration No. State Year	38. Vehicle Year-Make-Body-Model-Color(s)	39. Ignition Locked?	40. Keys in ignition?
N/A	N/A	N/A	N/A

41. Lienholder (Name-Address-Name of Agent)	42. Doors Locked?	43. Windows Closed?
N/A	N/A	N/A

44. IS THERE SOMETHING UNIQUE ABOUT THIS CRIME ☑ NO ☐ YES

NARRATIVE: USE CONTINUATION SHEET FOR NARRATIVE. DETAIL ALL ADDITIONAL INFORMATION RELATING TO THE INVESTIGATION

Department of Public Safety & Correctional Services
Internal Investigative Unit

Supplement Report

1. Complaint Control Number: CIR 0735008686

VICTIM COMPLAINANT, MISSING PERSON OR ARRESTEE (LAST, FIRST, MIDDLE)
Shidon Blake DOC#343-938

INCIDENT, OFFENSE OR CHARGE ON ORIGINAL REPORT
Assault by Lt. James Madigan

CORRECT INCIDENT OR OFFENSE CLASS
N/A

CHANGED? ☐ Yes

SECONDARY OFFENSE
N/A

65. RELATED REPORT NUMBERS
N/A

NARRATIVE

ITEM NO.

SUBJECT OF INVESTIGATION:

Inmate Shidon Blake DOC#343-938 was allegedly assaulted by Lieutenant James Madigan on June 21st, 2007.

ADDITIONAL WITNESSES:

FIELDS, Candis
Correctional Officer II
MRDCC
550 E. Madison Street
Baltimore MD 21202
410-879-3500
Will testify that she observed Lt. James Madigan struck Inmate Shidon Blake on 6/21/2008.

WOODWARD, Latia
Correctional Officer II
MRDCC
550 E. Madison Street
Baltimore MD 21202
410-879-3500
Will testify that she observed Lt. James Madigan struck Inmate Shidon Blake on 6/21/2008.

LIST OF EXHIBITS:

1. DPSCS-IIU Duty Officer's Checklist
2. SIR-MRDCC #07-008
3. Employee Authorization for Treatment
4. Release of Responsibility-signed by Inmate Shidon Blake
5. Use of Force/MRDCC#07-008
6. Inmate Statement-Inmate Shidon Blake

45. Crime Prevention Action Initiated? ☑ No	46. Previous Crime Prevention Survey			47. Date Supplemental Report Due	
48. Initial Status recommended by reporting officer ☐ Open ☐ Suspended ☐ Unfounded ☑ Closed	49. Initial Investigator [JI] **DSGT. John Iheoma**			I.D. Number 2004	50. Date 9/30/2008
51. Supervisor Status ☑ Agree ☐ Disagree	52. Investigation to be continued by ☐ Patrol ☐ Investigation ☑ N/A	53. Reviewing Supervisor /s/ M Hoffmann **Det. Lt. Michael Hofmann**		I.D. Number 2001	54. Date 09/30/08
55. Investigation Supervisor Status ☐ Patrol ☐ Investigative ☑ N/A	56. Investigation Supervisor /s/ Jesse Ballard **Det. Captain Jesse Ballard**	I.D. Number 0200	57 Date 9/30/08	58. Assigned Investigator **DSGT John Iheoma**	59. Date 6/22/2007
60. ☐ MCIC Cleared ☐ Miles Entered ☐ Miles Cleared	61. Final Status (Check one) ☐ Open ☐ Suspended ☑ Closed	62. Classification (Office Use) 4E		63. UCR Disp. CR	64. Page 2 Of 5

Department of Public Safety &
Correctional Services
Internal Investigative Unit

1. Complaint Control Number
CIR 0 7 3 5 0 0 8 6 8

Continuation Sheet

LIST OF EXHIBITS CONTINUED:

7. Witness Statement-Cpl. Candis Fields
8. Witness Statement-Cpl. Latia Woodard
9. Witness Statement- Cpl. Michael Ross
10. Unsatisfactory Report of Service
11. OBCIS-Inmate Shidon Blake
12. DPSCS-IIU Waiver Form

ACTION TAKEN:

On June 22nd, 2007, at approximately 2132 hours, Captain Calvin Vincent assigned to the Maryland Reception-Diagnostic and Classification Center (MRDCC) advised Detective Sergeant Robert Fagan of DPSCS-IIU that during an escort of Inmate Shidon Blake DOC#343-938; DOB: [redacted] Lt. James Madigan struck Inmate Shidon Blake who was handcuffed to the rear several times in the face with his fist. Captain Calvin Vincent also advised DSGT Fagan that Inmate Blake refused medical treatment. It was noted also that Officers Fields and Woodard witnessed the entire incident.

On June 25th, 2007, at approximately 0912 hours, I was assigned case #07-35-00868 involving Lt. James Madigan and Inmate Shidon Blake.

On July 3rd, 2007, I obtained the Serious Incident Report from the Security Chiefs Office (MRDCC)

and thoroughly reviewed it. The following excerpts are from the SIR:

At approximately 2150 hours on 6/21/07, Inmate Shidon Blake DOC#343-938 was being transferred from Unit #7 Charlie cell #22 to Unit #7 Bravo cell #16 located in the segregation unit. Inmate Blake was handcuffed from behind while being escorted by Sgt. Michael Ross. Lt. James Madigan attempted to hold Inmate Blake's right arm but he refused to allow Lt. Madigan to hold his arm by pulling away from him. It was noted that Lt. Madigan attempted for the second time to grab Inmate Blake's arm, again Inmate Blake told him not to touch his arm. It was reported by Cpl. Fields that Lt. Madigan shoved Inmate Shidon Blake down the pod stairs. Cpl. Fields, Latia Woodard, Sgt. Ross and Lt. Madigan all admitted that Inmate Blake was struck by Lt. Madigan. At that point, the scuffle began and entered the seventh floor corridor. After Cpl. Woodard called for assistance, responding officers assisted in securing Inmate Blake and eventually taking him to the medical unit for treatment. Inmate Blake signed medical waiver. It was noted that Inmate Blake did not sustain any physical injuries.

On July 12, 2007, at approximately 1022 hours, I, DSGT John Iheoma arrived at the Maryland Reception-Diagnostic and Classification Center to interview Inmate Shidon Blake. I found out from the Warden (MS. Felicia Hinton) that Inmate Blake had been transferred to Western Correctional Institution (WCI). Warden Hinton also advised me that disciplinary action against Lt. James Madigan was being

considered. I attempted to interview the two correctional officers who witnessed the incident but unfortunately, Officer Fields and Officer Woodard were on their scheduled days off.

The matter of records by officers Fields and Woodard were consistent with the contents of the serious incident report. They observed Lt. James Madigan strike Inmate Shidon Blake while he was handcuffed from behind.

Memorandum written by Lieutenant James Madigan alleged that Inmate Shidon Blake who was restrained from behind lunged at him with his upper body. In an attempt to defend himself, he used his right forearm to strike Inmate Blake in his face four times.

Use of force form was completed by Major Cherie Peay. The use of force stated that while Inmate Shidon Blake was being escorted by Sgt. Ross, he was accompanied by Lt. James Madigan. As Inmate Blake was being escorted, he told Lt. Madigan not to touch him and attempted to pull his arm from Lt. Madigan. At that time, a physical altercation ensued. Lt. Madigan perceived Inmate Blake as a threat and began to use his forearm to strike Inmate Shidon Blake. Responding officers arrived and help further restrain Inmate Blake.

On June 21st, 2007, Officer Fields issued an infraction ticket on Inmate Shidon Blake charging him with rules violations #100 (Being involved in any manner with a disruptive activity. This may include demonstration, unauthorized assembly, or disturbance;

misuse, damaging, or destruction of property), 104 (Use of Threatening language)

On July 5th, 2007, at approximately 1130 hours, Inmate Blake was found guilty of rule #405 (Possession of a weapon or any article modified into a weapon). Inmate Blake was sanctioned for 15 days in segregation unit. Inmate Blake was transferred to North Branch Correctional Institution.

On September 26th, 2008 I interviewed Inmate Shidon Blake. Inmate Blake told me that he did not want to pursue this case. Inmate Blake also told me that he will sign the waiver form requesting that this case be closed (**See Exhibit #12**).

Lt. James Madigan was relieved of his duties from the Department of Public Safety and Correctional Services on 7/13/2007. This decision emanated from the incident involving Inmate Shidon Blake and Lt. James Madigan.

SUMMARY:

On June 22nd, 2007, at approximately 2132 hours, Captain Calvin Vincent assigned to the Maryland Reception-Diagnostic and Classification Center (MRDCC) advised Detective Sergeant Robert Fagan of DPSCS-IIU that during an escort of Inmate Shidon Blake DOC#343-938; DOB: [redacted] Lt. James Madigan struck Inmate Shidon Blake who was handcuffed to the rear several times in the face with his fist. Captain Calvin Vincent also advised DSGT Fagan that Inmate Blake refused medical

treatment. It was noted also that Officers Fields and Woodard witnessed the entire incident.

On July 5th, 2007, at approximately 1130 hours, Inmate Blake was found guilty of rule #405 (Possession of a weapon cr any article modified into a weapon). Inmate Blake was sanctioned for 15 days in segregation unit. Inmate Blake was transferred to North Branch Correctional Institution.

On September 26th, 2008 I interviewed Inmate Shidon Blake. Inmate Blake told me that he did not want to pursue this case. Inmate Blake also told me that he will sign the waiver form requesting that this case be closed.

The investigation reveals that Inmate Shidon Blake was struck several times by Lt. James Madigan while he was handcuffed from behind. This investigation also revealed that Lt. James Madigan lost control of his emotions and did not act professionally. Due to the conduct unbecoming of a correctional officer, Lt. James Madigan was removed from responsibilities with the agency. The investigation also revealed that there was no injury sustained by Inmate Shidon Blake. Therefore, I recommend that this case be closed with no further action.

Case Closed
Iheoma (P)
16 Hours

Initial Investigator: DSGT. John Iheoma
IBM #: 2004 Date: 9/30/2008

EXHIBIT 1

Department of Public Safety & Correctional Services
Internal Investigative Unit

Duty Officer's Checklist

Date: 6/22/2007 Time: 2132 Hrs.
Institution MRDCC
Called (full name): Capt. Calvin Vincent
Phone: 410 878 4133
Incident Date: 6/21/2007 Time: 2150

Narrative: Capt Vincent reported that during an escort Lt. James Madigan struck inmate Shidon Blake who was handcuffed to the rear, several times in the face with his fist. The inmate refused medical treatment. Officers Fields, Woodard and Sgt. Rose were present when the incident occurred.

Inmate / Employee
VICTIM Inmate Shidon BLAKE Circle One
Sex: xx Male ☐ Female DOB: [redacted]
Circle One
B / W / O Ht./Wt.: 5'9", 208
Circle One SSN#: [redacted]
Inmate DOC #: 343538 Shift: N/A

Inmate / Employee
WITNESS Officer Candle FIELDS Circle One
Sex: ☐ Male ■ Female DOB: [redacted]
B / W / O Ht./Wt.: Unknown
Circle One SSN#: Unknown
Inmate DOC #: N/A Shift: 1500/2300

Inmate / Employee

WITNESS Officer Latie WOODARD Circle One

Sex: ☐ Male ■ Female DOB: [redacted]

B / W / O Ht./Wt.: Unknown

Circle One SSN#: Unknown

Inmate DOC #: N/A Shift: 2300/0700

Region: Metro XX Western: _____ Eastern: _____

07-35 0 0 8 6 8 Code: 4

I ■ F ☐ A ☐ C ■ IR ☐ /s/ JMII 6/25/07

Investigator: IHEOMA

Investigator's Signature:

R. Fagan /s/ R. Fagan Date: 6/22/2007

☐ IIU Supervisor ☐ Clerical Staff

☐ Case Ledger ☐ Field Investigative Supervisor

PAGE 1 OF 2

Internal Investigative Unit

Duty Officer's Checklist Page 2 of 2

Date: 6/22/2007 Time: 2132

Institution MRDCC

Called (full name): Capt. Calvin Vincent

Phone: 410-878-4133

Incident Date: 6/21/2007 Time: _____

Narrative: Capt. Vincent reported that during an escort Lt. James Madigan struck inmate Shidon Blake was handcuffed to the rear, several times in the face with his fist. The inmate refused medical treatment. Officers Fields, Woodard and Sgt. Rose were present when the incident occurred.

Inmate / **Employee**
Circle One

Suspect (full name): Lt. James MADIGAN
Sex: ■ Male ☐ Female DOB: [redacted]
Circle One
AA / W / O Ht./Wt.: **N/A**
Circle One SSN#: [redacted]
Inmate DOC #: _____ Shift: **N/A**

Inmate / **Employee**
Circle One

Witness Sgt. Michael Ross
Sex: ■ Male ☐ Female DOB: [redacted]
AA / W / O Ht./Wt.: _____
Circle One SSN#: NA
Inmate DOC #: _____ Shift: **1500/2300**

Inmate / Employee

Witness **NA**
Sex: ☐ Male ☐ Female DOB: **NA**
AA / W / O Ht./Wt.: _____
Circle One SSN#: _____
Inmate DOC #: _____ Shift: **NA**

Region: Metro XXXX Western: ____ Eastern: ____
07-35 **0** **0** **8** **6** **8** Code: **4**
I ■ F ☐ A ☐ C ■ IR ☐ /s/ JMI [Illegible]
Investigator: **IHEOMA**
Investigator's Signature:
R. Fagan Date: 6/22/2007
Copy to: ☐ IIU Supervisor ☐ Clerical Staff
☐ Case Ledger ☐ Field Investigative Supervisor

Department of Public Safety & Correctional Services

Internal Investigative Unit

Prior Case History

Name: BLAKE, Sheldon **Date: June 21, 2007**

Rank: Inmate@MRDCC Case No. 07-35-00868 I/C

RECORD OF PREVIOUS COMPLAINTS

IIU Case No.	**Accused and Date**	**Disposition**

Check ✓ no prior DPSCS-IIU contact exists.

The above represents a check of the files of the Department of Public Safety and Correctional Services, Internal Investigative Unit.

Provided by:

/s/ [Illegible]
Title: Secretary I

Department of Public Safety & Correctional Services

Internal Investigative Unit

Prior Case History

Name: MADIGAN, James Date: June 21, 2007

Rank: Employee@MRDCC Case No. 07-35-00868 I/C

RECORD OF PREVIOUS COMPLAINTS

IIU Case No.	Accused and Date	Disposition
V3504-00199	09/21/1990 (s) Accidental discharge of firearm person investigated.	Archives
V3504-00003	01/05/1995 (s) Sexual Misconduct	Archives

Check ___ no prior DPSCS-IIU contact exists.

The above represents a check of the files of the Department of Public Safety and Correctional Services, Internal Investigative Unit.

Provided by:

/s/ [Illegible]
Title: Secretary I

EXHIBIT 2

[SEAL] **Department of Public Safety and Correctional Services**

Division of Correction
Maryland Reception-Diagnostic and Classification Center
550 E. MADISON STREET •
BALTIMORE, MARYLAND 21202
(410) 878-3500 • FAX (410) 783-4108 •
TTY USERS 1-800-735-2258 •
www.dpscs.state.md.us

MEMORANDUM

To: **Rory Jones, Acting Security Chief**

From: **Cherie N. Peay, Major** /s/ cnp

Date: **June 21, 2007**

Subject: **Inmate Shidon Blake 343938, SIR# 07-043, UOF# 07-008**

On June 21, 2007 inmate Shidon Blake 343938 was out for recreation on unit 7 Charlie when Corporal Candis Fields reported to Sergeants Michael Ross and Tuan Davis that inmate Blake, S was attempting to control the inmate telephones. Both Sergeants responded to the unit and secured inmate Blake, Shidon in cell 7Charlie-22. At the completion of recreation, Cpl. Fields submitted a Notice of Infraction for inmate Blake. Shidon and Lt. James Madigan and Sgt. Ross responded to 7 Charlie to escort inmate Blake, S to Administrative Segregation status on unit 7 Bravo.

During the escort from 7 Charlie to 7 Bravo, inmate Blake, Shidon refused to allow Lt. Madigan to touch him as he was being escorted and began to swing his body away from Lt. Madigan. The altercation quickly escalated as Lt. Madigan percieved that inmate Blake, Shidon was going to free himself from the control of Lt. Madigan and Sgt. Ross and become a more serious threat. Cpl. Latia Woodard, 7 Corridor Officer, called for Officer Assistance via radio. The response team arrived on the scene and escorted inmate Blake, Shidon to the medical unit for an evaluation. Inmate Blake, Shidon refused medical treatment, pictures were taken and the inmate was escorted back to cell 7Bravo-16.

[SEAL] **Department of Public Safety and Correctional Services**

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www.dpscs.state.md.us

To: Major Cherie Peay, 3-11 Shift Commander

From: Captain Calvin Vincent /s/ cv

Date: June 21, 2007

Reference: Use of Force #07-008 (Shidon Blake #343-938)

On June 21, 2007 inmate Shidon Blake 343-938 was being transferred from unit 7 Charlie cell 22 to unit 7Bravo cell 16, the segregation unit, because of his attempt to rile inmates housed on 7-C relative to using the inmates' telephones. Earlier, inmate Blake was reported to have said to inmates, in a belligerent tone, that they, as inmates, could control who uses the inmates' telephones. Because of this, he was being placed on administrative segregation. The inmate was handcuffed from behind while being escorted by Sgt. Michael Ross and refused to allow Lt. James Madigan to take hold of him to assist Sgt. Ross in the escort by snatching away from Lt. Madigan when Lt. Madigan attempted to grab his arm. It is reported by Cpl. Candis Fields that Lt. Madigan shoved inmate Blake down the pod stairs as Sgt. Ross was escorting the inmate. Corporals Fields, Latia Woodard, Sgt. Ross and Lt. Madigan all admit that Lt. Madigan hit the inmate in his face though the number of strikes and the position of the strikes vary to some degree. As the scuffle entered the seventh floor corridor Officer Woodard call for assistance, via two-way radio. As the response team arrived, inmate Blake was sitting on the floor of 7 corridor, again, with his hands cuffed from behind as Sgt. Ross stood over him while Lt. Madigan looked on. The area was deemed secured and the inmate was taken to the medical department where he was superficially examined because he refused treatment. He signed a medical waiver form.

There was no apparent injury to the inmate. However, Sgt. Ross sustained contusions to his knees as a result of falling in the scuffle. Internal investigation unit was notified the following day and assigned case number 07-35-00868 IC.

Though Lt. James Madigan wrote in his report that he feared for his safety, I conclude that the risk to his safety was negligible at best. I further conclude that the situation was escalated by Lt. Madigan's rigidness not to heed the request, then demand, of the inmate as well as Sergeant Michael Ross's comment that he, Sgt. Ross, had the inmate under control. In short, the event could have been avoided. Therefore, I recommend that Lt. James Madigan receive fifteen days suspension or forfeiture of the 120 hours of annual leave and/or mandatory use of force training. As of Monday June 25, 2007 Lt. Madigan is on administrative leave pending termination.

[SEAL] **Department of Public Safety and Correctional Services**

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MEMORANDUM

To: Felicia M. Hinton, Warden

From: Lt. James Madigan, 3-11 Shift /s/ jm

Date: June 21, 2007

Subject: Inmate Shidon Blake # 343-938-Signal 13 in 7-Corridor

Ma'am,

On June 21, 2007 I Lt. James Madigan, along with Sgt. Michael Ross, was escorting Inmate Blake, Shidon # 343-938 7C-7122 (so identified by his state ID badge) to Housing Unit 7-Bravo to be placed on Administrative Segregation (Ofc. Candice Fields had written a Notice of Infraction on the inmate due to his attempt to take over the housing unit.) As we exited the pod, Inmate Blake, who was restrained with handcuffs behind his back, kept yelling at me: "Don't you touch me!" while trying to break free from Sgt. Ross's grasp. This prompted me to grab his right arm in an attempt to quell further resistance. Inmate

Blake increased his resistance, shaking his body fiercely, causing us to lose our grasp. He then lunged forward at me with his upper body.

In an attempt to regain control (and fearing for my safety), I used my right forearm, striking his face four times. He continued to resist with the same intensity, jumping and shaking in such a manner that rendered controlling him very difficult. During this, he yelled: "You wait until I break free from these cuffs; you don't know who I am – I am with the Bloods!"

As Sgt. Ross and I struggled to regain control of Inmate Blake, Ofc. Latisha Woodard radioed a "Signal 13", which the Control Center relayed. Sgt. Ross tried to bring him to the floor by dragging his left arm, while I grabbed him around the upper torso. My legs became tangled with the inmate's, causing him to fall back. I fell on top of him, pinning him with my right forearm to his face, thus ending his resistance, and our use of force. The Quick Response Team then arrived to escort Inmate Blake to the Medical Unit for evaluation.

Respectfully submitted.

[SEAL] **Department of Public Safety and Correctional Services**

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www.dpscs.state.md.us

MEMORANDUM

To: **Major Cherie N. Peay, 3-11 Shift**

From: **Lt. Ronald Joyner, 3-11 Shift**

Date: **June 21, 2007**

Subject: **Blake, Shidon 343938**

On June 21, 2007 at approximately 10:00 p.m., I, Lieutenant Ronald Joyner of the 3-11 shift, responded to a called Signal 13 on 7 Corridor. Upon my arrival to 7 Corridor with the response team I observed Sergeant Michael Ross on the floor restraining an inmate who was later identified as Shidon Blake 343938. The inmate was controlled and complied with all orders given. I then escorted inmate Blake to the medical unit for an evaluation. Once evaluated inmate Blake was then escorted to Segregation Unit 7 Bravo cell 16.

HDU Duty Lt. Pri. #1
Ph. 410-333-8732 or 410-333-1733 x 216
Maryland Division of Correction

SOU Ph: 410-585-3456 Appendix 1 to DCD 20-3
SOU FAX: 410-358-4178 E-mail: SIR@dpscs.state.md.us

☐ Preliminary Serious
☒ Final Incident Report

Control #: MRDCC - 07 - 043
Facility Year Sequence #

Incident Date: 6-21-07 Time: 2150 hrs.

Section A Incident Categories	
Priority 1	
	1a Accident Firearm Discharge
	1b Adverse Job Action
	1c Arrest, Staff
	1d Assault, Inmate, Life Threatening
	1e Assault, Staff, Life Threatening
	1f Attempted Escape
	1g Deadly Force
	1h Death, Inmate, Accidental
	1i Death, Inmate, Homicide
	1j Death, Inmate, Suicide
	1k Death, Inmate, Unknown
	1l Death, Staff on Duty
	1m Disturbance, Force Used
	1n EOC Activation
	1o Escape
	1p Fire, Fire Dept. Required
	1q Hazard, Evacuation Req.
	1r Homicide, Staff
	1s Injury, Inmate, Life Threatening

	1t	Injury, Staff, Life Threatening
	1u	Other
	1v	Security Breach Staff Needed
Priority 2		
	2a	Arrest, Inmate
	2b	Arrest, Visitor
	2c	Assault, Inmate, Weapon Used
	2d	Assault, Staff, Physical
	2e	Attempted PR Escape
	2f	Attempted Suicide
	2g	Death, Inmate, Natural
	2h	Drugs Recovered
	2i	Escape, Pre-release
	2j	Hazard, No Evacuation
	2k	Injury, Visitor
	2l	Inmate Group Protest
X	2m	Other
	2n	Secondary Medical, Inmate
	2o	State Property Damage

Section B	**Facility Notifications**	
Time Notified	**Title**	**Name**
	Commissioner	
	Deputy Commissioner	
	Asst. Commissioner	
	DOC PIO	
2127 hours	IIU	Det. Sgt. Robert Fagan
1200 hours	Warden	Felicia Hinton
	Assistant Warden	
2200 hours	Security Chief	Rory L. Jones
	Facility Administrator	
2150 hours	Shift Commander	Cherie Peay

	Reg. Health Care Admin.	
	Director Medical Services	
	Asst. Director Mental Health	
	FBI	
	State Police	
	Local Police	
	Other	
	Other	
	Other	
	Other	
	Other	

Section C Reporting Official

Incident Reported to SOU/HDU DUTY LT.

Date: 6-21-07 Time: 0047 hours

To: SIR E-mail

Name Last, First Title

By: Vincent Calvin E-mail

Name Last, First Title

Shift Commander/Designee

Peay, Cherie

Name Last, First

Cherie S. Peay 6-21-07 0049 hours

Signature Date Time

Section D Involved Inmates					
DOC #	Last Name, First Name M.I.	DOB	Race	Security Level	09
343-938	Blake, Shidon	[redacted]	B	MAX	Y
Involvement/Injury:					
Involved in a use of Force/claims injury to the left side of his face					
Sentence					
Years	Months	Beginning	Offenses		
Life	00	05-16-06	Murder first degree		

Section E Staff and/or Public Involved		
Last Name, First Name M.I.	Title	Involvement
Madigan, James	Lieutenant	Use force to subdue inmate
Joyner, Ronald	Lieutenant	Escorted inmate to medical
Ross, Michael	Sergeant	Assisted with inmate escort to segregation
Woodard, Latia	Corporal	Called for officer assistance via two-way radio
Ajasa, Olushola	Corporal	Took photographs
Fields, Candis	Corporal	Housing Unit Officer
Brooks, Prusella	Nurse	Examined Inmate

Section F Escape Information		
	Date	Time
Last Accounted For	N/A	N/A
First Unaccounted For	N/A	N/A
Arrived at Pre-Release	N/A	N/A
		Result
Last Parole Hearing	N/A	N/A
Was Inmate Arrested	Yes ☐	No ☐
History of Escape	Yes ☐	No ☐

Section G	Description of Incident/ Action Taken
On June 21, 2007 inmate Shidon Blake 343-9383 was was being transferred from unit 7 Charlie cell 22 to unit 7 Bravo cell 16, the segregation unit, because of his attempt to rile inmates housed on 7-C relative to using the inmates' telephones. Earlier, inmate Blake was reported to have said to inmates, in a belligerent tone, that they, as inmates, can control who uses the inmates' telephones. Because of this, he was being placed on administrative segregation. The inmate was handcuffed from behind while being escorted by Sgt. Michael Ross and refused to allow Lt. James Madigan take hold of him to assist Sgt. Ross in the escort by snatching away from Lt. Madigan when Lt. Madigan attempted to grab his arm. It is reported by Cpl. Candis Fields that Lt. Madigan shoved inmate Blake down the pod stairs as Sgt. Ross was escorting the inmate. Corporals Fields, Latia Woodard, Sgt. Ross and Lt. Madigan all admit that the inmate was hit by Lt. Madigan though the number of strikes and the position of the strikes vary to some degree. As the scuffle entered the seventh floor corridor Officer Woodard called for assistance, via two-way radio. As the response team arrived, inmate Blake was sitting on the floor of 7 corridor, again, with his hands cuffed from behind as Sgt. Ross stood over him while Lt. Madigan looked on. The area was deemed secured and the inmate was taken to the medical department where he was superficially examined because he refused treatment. He signed a medical waiver form. There was no apparent injury to the inmate. However, Sgt. Ross sustained contusions to his knees as a result of falling in the scuffle. Internal investigation	

unit was notified the following day and assigned case number 07-35-00868 IC. Dispciplinary actions are pending based on the outcome of the final investigation.

[SEAL] DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
OFFICER'S USE OF
FORCE INCIDENT REPORT

(USE CONTINUATION SHEET, AS NEEDED)

☒ DIVISION OF CORRECTION
☐ DIVISION OF PRETRIAL & DETENTION SERVICES
☐ DIVISION OF PAROLE & PROBATION
☐ PATUXENT INSTITUTION

TO: SHIFT COMMANDER/BUREAU CHIEF

DATE OF INCIDENT: 6-21-07 TIME OF INCIDENT: 9:45 p.m. A.M. P.M.

LOCATION: 7 Corridor

OFFICER INVOLVED:

Lt. James Madigan

Sgt. Michael Ross

OFFENDER(S)/DETAINEE(S) INVOLVED:

Blake Shidon # 343-938

CHECK IMPLEMENTS OF FORCE USED:

☐ Pepper Spray ☐ Pepper Ball ☐ Baton
☐ Stun Shield ☐ K-9 ☐ Chemical Agents
☐ Firearm (Revolver, Shot Gun, or Rifle)
☒ Hands, Feet, Defensive Holds, Etc. ☐ Other

DETAILS OF USE AND EFFECT OF USE:
On June 21, 2007 at 9:45 p.m., I, Lt. James Madigan, along with Sgt. Michael Ross, was escorting Inmate Blake Shidon # 343-938 off of Housing Unit 7 Charlie to be placed on Administrative Segregation. As we exited the pod, Inmate Blake, who was restrained with handcuffs, kept yelling at me: "Don't you touch me." He was trying to break from Sgt. Ross's grasp, prompting me to grab his right arm to attempt to move him toward Housing Unit 7-Bravo. The inmate increased his resistance, struggling to break free from our grasp, and lunging toward me. In an attempt to subdue him, I used my right forearm to his face four times. Inmate Blake continued to resist and yelled: "You wait until I break free of these cuffs; you don't know who I am – I am with the Bloods!" As we struggled, Ofc. Latisha Woodard radioed a Signal-13, which the Control Center relayed. Sgt. Ross tried to bring him to the floor by dragging his left arm while I grabbed him around the upper torso. My legs became tangled with the inmate's, causing him to fall back. I fell on top of him.

CONTRABAND DISCOVERY/SEIZURE:
n/a

INJURIES SUSTAINED AS A RESULT OF USE:
☒ OFFENDER/DETAINEE ☐ STAFF ☐ OTHER
PERSON(S) REQUIRING MEDICAL AID:
Blake, Shidon # 343-938
PERSON(S) REQUIRING MEDICAL AID:

PERSON(S) REQUIRING MEDICAL AID:

REPORTING
OFFICER: Lt. James Madigan DATE: 6-21-07
SIGNATURE

Lt. James Madigan
PRINT

SUPERVISOR: Cherie S. Peay
RANK/TITLE: [illegible] DATE: 6-21-07
SHIFT: 3-11
SUPERVISORS COMMENTS: ~~none~~ INCIDENT REQUIRES FURTHER INVESTIGATION

CONTINUATION SHEET

pinning him with my right forearm to his face, thus ending his resistance, and our use of force.

REPORTING
OFFICER: Lt. James Madigan DATE: 6-21-07
SIGNATURE

Lt. James Madigan
PRINT

SUPERVISOR: Cherie S. Peay
SHIFT: 3-11 DATE: 6-21-07
SUPERVISORS COMMENTS:

CC: Warden, Asst. Warden, Security Chief, Use of Force Files

[SEAL] DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES

- ☒ Division of Correction
- ☐ Division of Pretrial and Detention Services
- ☐ Division of Parole and Probation
- ☐ Patuxent Institution

WITNESS STATEMENT

Name: Michael Ross

Address: 550 E. Madison St. Telephone Number 410-878-3500

Where Statement Was Given: M.R.D.C.C. Time: 11 55/PM

Witness Statement of Facts (What Happened):

I Sergeant Michael Ross at approximately 9 50/PM was called by Lieutenant James Madigan to 7 corridor to assist in the escorting of inmate Blake Shidon – 343938 – 7c-7122. I approached Cell #7C-22 with Lt. J. Madigan and Lt. J. Madigan ordered the above inmate to pack up his clothes. The above inmate stated "For what". I then asked Lt. J. Madigan do you want me to open the cell door he said no wait until he finish packing his clothes. Approximately one minute later Lt. J. Madigan told me to open the cell door. I opened the cell door and the above inmate was standing in the doorway saying "Why I am going on lock up." Lt. J. Madigan said your going to receive a ticket for trying to start a riot on this pod. While Lt. J. Madigan was making that statement he was holding his handcuffs approximately 10" away from his body in front of him. The above inmate stated: "I wasn't trying to do nothing". Lt. J. Madigan said you turned the T.V. off. The above inmate said "I don't

even look at T.V. the officer is lying". Approximately one and a half minutes later Lt. J. Madigan was still holding the handcuffs out in front of himself saying to the above inmate you will have a hearing but you still have to go on lockup. At this time, I reached for my handcuffs and handed the pod keys to Lt. J. Madigan and stepped into the cell and told the above inmate your going on lockup. The above inmate said "Okay ross your cool. I then placed the first handcuff on the inmates right wrist and then the inmate put his hands in front of him and I placed the inmates hands in back of him and put the second handcuff on him. At this time I was escorting the above inmate out of his cell when Lt. J. Madigan grabbed the inmates arm the above inmate said "get the fuck off of me". I then started going down the pod steps and as I got to the bottom of the steps the above inmate said "get the fuck off of me. Lieutenant Sgt. Ross got me. You didn't come talk to me before so don't touch me now". At this time I said "I got him Lieutenant. I am okay I got him". Lt. J. Madigan didn't respond. I then started escorting the above inmate toward 7C pod door that leads off the pod to 7 Corridor when I noticed Corporal Candis Fields who is assigned to 7C pod standing by the door. I told her to move away from the door while I was escorting the above inmate pass her. I then escorted the above inmate off the pod to the corridor by holding his left arm. Once we reached the Corridor the above inmate started twisting his arms and body from side to side saying "get the fuck off of me". He was saying this to Lt. J. Madigan who had grabbed the above inmates right arm. I then started pulling the inmate toward 7B pod that is located on the other end of the Corridor. At this time I noticed

Lt. J. Madigan swing his right arm toward the above inmates face making contact with the inmates face. I didn't notice anything in Lt. J. Madigan's hand at this time or no other time during this incident. I continued struggling and pulling the above inmate toward 7B pod when the above inmate said "Ross he hit me in my face". I then moved the inmate toward the wall and stared him in his eyes and said "Come on". The above inmate was still twisting his body trying to get Lt. J. Madigan off of his arm. I took approximately five steps while still pulling the above inmate the inmate said "Ross he hit me again". I didn't see the claimed hit. At this time Lt. James Madigan told Corporal Latia Woodard who is assigned to 7 Corridor to spray the above inmate with mace. Cpl. L. Woodard said "No just let him go". Lt. J. Madigan said in a loud tone "mace him". I then told Cpl. L. Woodard to call a signal-13 (officers Fighting) and I observed her reaching for her radio. At this time I told inmate Blake, S-343938 that I was taking him to the floor and he said "okay". At this time while trying to pull the above inmate to the floor our feet entangled and the above inmate and Lt. J. Madigan and myself fell on the floor. I then told Lt. J. Madigan "I got him I got him". The above inmate started yelling "Pick me up ross". I then told him to calm down. I have to wait for my team. approximately 15 seconds

The above statement is true and correct to the best of my knowledge and belief. It was given solely due to my volunteering the information. Therefore, I was not coerced or forced to give the same.

/s/ Michael Ross	6-21-07
WITNESS SIGNATURE AND NUMBER	**DATE**
Capt. Calvin Vincent 5 of 6	6/21/07
WITNESS TO STATEMENT	**DATE**

[SEAL] DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

☒ Division of Correction ☐ Division of Pretrial Detention and Services

☐ Division of Parole and Probation ☐ Patuxent Institution

WITNESS STATEMENT

Name: Latia Woodard

Address: 550 E. Madison St.

Telephone Number 410-878-4132

Where Statement Was Given: MRDCC

Time: 2155

Witness Statement of Facts (What Happened):

On June 21, 2007 at approximately 9:50 p.m., I Cpl. Latia Woodard was assigned to 7 corridor and was standing at 7 charlies doorway observing Lt. James Madigan and Sgt. Michael Ross escorting inmate Blake, Shidon 343928 from cell 22 to 7 bravo. As inmate Blake was coming out of his cell handcuff to the back Blake told Lt. Madigan not to touch him. Sgt. Ross escorted inmate Blake down the stairs and as they were walking out of the door Lt. Madigan

grabbed Blakes arm. Inmate Blake tried to pull away from Lt. Madigan and as he's pulling away he's telling Lt. Madigan to get off of him but he continues to holding on to him. Inmate Blake stops at the door and tells Lt. Madigan again to let him go but Lt. Madigan does not. Inmate Blake would not move and Lt. Madigan hit Blake in his jaw. I Cpl. Woodard repeatly told Lt. Madigan to let inmate Blake go and let Sgt. Ross escort him to 7 bravo but he did not listen. Inmate Blakes says hit me again and Lt. Madigan hits Blake repeatly in his jaw. Inmate Blakes tries to knee Lt. Madigan but was not successful. As Lt. Madigan, Sgt. Ross and inmate Blakes are walking towards the elevator Lt. Madigan tells me Cpl. Woodard to mace Blake and my response was no and that's when Sgt. Ross told me to call a signal 13. Approximatley 9:56 p.m. a response team arrived on the corridor and escorted inmate Blake to medical. This report is submitted for your records.

The above statement is true and correct to the best of my knowledge and belief. It was given solely due to my volunteering the information. Therefore, I was not coerced or forced to give the same.

/s/ Latia Woodard RC041	6/21/07
WITNESS SIGNATURE AND NUMBER	**DATE**
/s/ Cherie S. Peay	6-21-07
WITNESS TO STATEMENT	**DATE**

[SEAL] DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

☒ Division of Correction ☐ Division of Pretrial Detention and Services

☐ Division of Parole and Probation ☐ Patuxent Institution

WITNESS STATEMENT

Name: Cpl. Candis Fields 3x11

Address: 550 E. Madison St.

Telephone Number 410 878 3580

Where Statement Was Given: MRDCC

Time: 640 p

Witness Statement of Facts (What Happened):

On the above date and time, I Cpl. Candis Fields was assigned to 7 charlie. Upon beginning top tier evening recreation and phone list, inmate Blake, Shidon #343938 7C-22 turned off the pod's television and stated, "which one of you told her to run a phone list? We run our own phone list up here. We men." Inmate Blake, Shidon #343938 then stated to me, Cpl. Fields "you need to fall back and let us run this: We can run our own phone list." I then stated to inmate Blake, Shidon #343938 "as the pod officer I will run a phone list to ensure that everyone gets a fair turn on the phone." Inmate Blake, Shidon #343938 then stated to another inmate "she goin' cause somebody to get hurt." I then informed Sgt. Michael Ross and Lt. James Madigan of my observations and inmate's statements. At 715 p Sgt. Michael Ross and Sgt. Taun Davis entered 7 charlie and secured inmate Blake,

Shidon #343938 7C-22 into his cell without force or incident. At 810 p Lt. James Madigan called 7 charlie and I, Cpl. Fields requested that inmate Blake, Shidon #343938 7C-22 be moved off of unit 7 charlie due to several inmates stating that inmate does not allow others to use the telephone unless he approves. Inmates also stated that Blake, Shidon #343938 7C-22 intimidates other inmates by stating that he's head of the Bloods. Lt. Madigan then stated to me, Cpl. Fields "well the only way he'll be moved is if you write a ticket on him with charges 100 104 312 405." I, Cpl. Fields then proceeded to write a notice of infraction with these listed charges to ensure that inmate Blake, Shidon #343938 7C-22 was no longer a threat or concern to other housed inmates. At 940 p, Lt. Madigan came onto 7 charlie along with Sgt. Michael Ross and requested my handcuffs. I then handed him the handcuffs and we all proceeded to cell 7122. Lt. Madigan then ordered Blake, Shidon #343938 to "pack up." Inmate then inquired "Why?" Lt. Madigan stated "you're Mr. Tough Guy trying to take over a unit. Let's go." Inmate then packed up his things and I, Cpl. Fields handed Lt. Madigan my podset keys #241 and proceeded to the officer's level of the unit. Lt. Madigan and Sgt. Ross then secured inmate by means of handcuffs and proceeded down the steps. Inmate Blake, Shidon #343938 began to be slowful coming down the steps being escorted by Sgt. Ross when Lt. Madigan began to shove inmate in a forceful way down the steps. Inmate Blake, Shidon #343938 began to shout obsene remarks to Lt. Madigan. Inmate continued these remarks until reaching

the threshold of 7 charlie where Lt. Madigan with keyset #241 in a closed fist struck inmate Blake, Shidon #343938 7C-22 repeatedly on the right side of his jaw with his right hand. Inmate Blake, Shidon #343938 7C-22 then became very agitated stating "let me go, you hit me in my fucking mouth take these cuffs off." Inmate stated this statement repeatedly with Sgt. Ross trying to remain in control of inmate. At 955 p, Cpl. Latia Woodard assigned to 7 corridor made a radio transmittion "signal 13 7 corridor" due to Sgt. Ross and Lt. Madigan unable to gain control of inmate Blake, Shidon #343938 7C-22. Inmate was clearly identified by his DOC badge, escorted to the medical unit, and then housed in 7B-16 by Cpt. Calvin Vincent. This is submitted for your information.

The above statement is true and correct to the best of my knowledge and belief. It was given solely due to my volunteering the information. Therefore, I was not coerced or forced to give the same.

/s/ Candis Fields	6-21-07
WITNESS SIGNATURE AND NUMBER	**DATE**
/s/ Cherie S. Peay	6-21-07
WITNESS TO STATEMENT	**DATE**

Documentation Reviewed:

☐ Use of Force Reports ☐ Shift Supervisor's Report

☐ Video Tape ☐ Staff Incident Report

☐ Photographs ☐ Medical Report

☐ Shift Supervisor's Report ☐ Staff Incident Report

☐ Other Specify: _____

This Evaluation Committee has determined:

☐ The action taken with respect to this use of force incident was reasonable and necessary.

☐ This incident needs further investigation and has been referred to ___ (print name of individual)

☐ A copy of this packet was sent to the Commissioner/ Director.

Other Action Recommended: _____

Administrative Evaluation Committee		**Date Reviewed**	**Time Reviewed**
James B. [Illegible]	/s/ James B. [Illegible]	7/2/07	8:30 p
Printed Name	Signature		
Rory L. Jones	/s/ Rory L. Jones	7/2/07	5:45 pm
Printed Name	Signature		

P/1 OBSCIS OFFENDER FUNCTION

MAINTAIN DETAINER DATA

PAGE 1

DATE: 06/21/07

TIME: 22:29

#: 343938 BLAKE SHIDON

ACTION	: ___
SEQUENCE	: 001
TYPE	: 12 MD WARR
OFFENSE CODE 1	:
OFFENSE DESC 1	:
OFFENSE CODE 2	:
OFFENSE DESC 2	:
JURISDICTION	: 028 OUT OF STATE
AGENCY	: 829 FL MIAM-DAD PD
CONTACT INFORM	:
DATE PLACED	: 12 08 2006
SENT LENGTH	: Y M D Y M D Y M D
CASE NUMBER	: F021998413
DATE	: 06 04 2007
PER	: DAVIS T TA
LIFTED	:
DATE LIFTED	:

– INQUIRY ONLY.

———

P/1 OBSCIS OFFENDER FUNCTION

MAINTAIN LEGAL DATA

PAGE 1
DATE: 06/21/07
TIME: 22:30

#: 343938 BLAKE SHIDON

CURR. RELEASE DATE: __ __ ____

TOTAL TERM OF CONFINE: Y M D

MAX EXPIRATION DATE:

ACTION	: ___	___
SENTENCES #	: 01	02
TYPE	: 15 LIFE ORG	02 CC
SENT IMPOS DATE	: 05 30 2007	05 30 2007
OFFENSE CODE	: 101 HOMICIDE	104 HOMICIDE
OFFENSE DESC.	: MURDER 1ST DEGREE	MURDER 2ND DEGREE
SENT LENGTH	: Y M D	Y 030 M 00 D 000
SENT START DATE	: 05 16 2006	05 16 2006
COURT	: 30A BCI-CIR-CT	30A BCI-CIR-CT
INDICTMENT #	: 00106177029	00106177028
TRACKING #	: 061001288740	061001288740
JURISDICTION	: 003 BALTIMORE CITY	003 BALTIMORE CITY
DATE OF OFFENSE	: __ __ ____	__ __ ____
ACM	: CL CR2 201	CR 2 204
COMMENTS	: __ __ __ __ __ __	__ __ __ __ __ __
DATE ENTERED	: 06 04 2007	06 04 2007
[ILLEGIBLE]	: DAVIS T TA	DAVIS T TA

– INQUIRY ONLY.

____

[SEAL] **Department of Public Safety and Correctional Services**

Division of Correction
Maryland Reception-Diagnostic and Classification Center

550 E. MADISON STREET • BALTIMORE, MARYLAND 21202
(410) 878-3500 • FAX (410) 783-4106 • TTY USERS
1-800-735-2256 • www.dpscs.state.md.us

MEMORANDUM

TO: Mrs Rory L. Jones, Security Chief.

FROM: Lt. James Madigan, 3-11 Shift [JM]

DATE: June 22, 2007

SUBJECT: Sgt. Michael Ross: On the job injury preventability.

Ma'am:

On June 21, 2007 at 9:55 p.m., Sgt. Michael Ross was assisting with the escort of Inmate Blake, Shidon # 343-938 from 7-Charlie to cell 7B-7216. It was then that the inmate put up resistance, and, in the ensuing struggle, caused Sgt. Ross to fall, landing hard on his knees.

Upon interviewing Sgt. Ross, and reviewing the photographs, I find that the accident was not preventable, as the incident involved an inmate resisting and interfering with an officer in the performance of his duties.

Respectfully submitted.

MRDCC INMATE STATEMENT FORM

In your own words please describe the actual facts of the alleged incident:

I was confronted by Ms. Feilds after returning from DNA testing about using the phone out of turn but she was wrong. Inmate Spears gave me his space because I missed mine. Ms. Fields plays around alot, when I see her but Im not a guy who makes and play with her at all. So I responded to her with the inmate whose time I was using everything was over. 20 minutes or so later Sgt. Ross and another Sgt. enters the unit and approach me. They tell me to lock in, now its my rec time and rec wasn't over but I still obeyed without incident. I ask to speak to a higher supervisor because I didn't understand why I had to lock in early. ~~Mean while a half an hour goes by~~ OK Sgt. with Ross said the LT said lock me in because I was "comendeering the TV" was the exact words he used. Which is not true you can ask the unit. I dont even watch the TV at all. About a half hour later Ms. Fields lets a new cell mate in my cell and I asked her why would she make things up about the TV she said in front of the new dude in cell 22 I never said you did that. Also the working men and others were in the pod. She laughs and says you scare my inmates. The Musilum working man replies hehe no he don't the man is alright. Ms Field shuts the door. Im in bed now and about another 30 min this white dude LT and Sgt. Ross approached my cell and the LT told me to lock up I asked why he said your moving and pack up with a foul attitude. I packed my things without any problem and asked what did I do he said you like

to run things. I asked him and Sgt. Ross what was he talking about. He said my officer told me and I believe it. Lets go. So I am leaving with the cuffs on behind me and LT grabs me up after Sgt. Ross already had me walking me down the stairs. LT is pushing behind kind a I said look Im going with Ross with no problem he can leave me alone – he never stopps. OK we get outside the unit and LT. balls his fist up with the keys in his hands and pounds me in my face on my left side of my head and my left eye. I told him several times he had no right punching me cause I was not fighting him and I was being taken out by Sgt. Ross. The whole time he's punching me in the face I couldn't do nothing but yell obsenaties at him because at this time Im not I called him a few bitches yes but after he had already punched me about 5 good times. Sgt. Ross just let him do it Im asking him why would he let the man just punch me. Then LT calls for the hall CO telling her to mase me and she replied why Just let him get to the pod "I [illegible] she even said that." By this time Im on my side telling Sgt. Ross "Man I was going he had no right punching me like that. So I layed on the ground until the other team of officers responded. I asked Sgt. Ross & the LT for the record for the chain of command respectfully and while I was cooperating with their directions and I was attacked by this LT while unable to defend myself. I was taken to Medical photographed medicated and escorted to lock up. I am asking for a formal internal investigation. I have the utmost respect for the job you all have to do and I will not be going any further with this situation outside

this institution. I also am a highly influential person and I give my word that there will be no revenge.

/s/ Shidon Blake

P.S. I will repeat this exact statement under oath at any time you need. Please investigate this incident.

Shaidon Blake	7C 22	6-21-07
Inmate Signature	Unit/Cell Number	Date/Time

Capt. Calvin Vincent
Witness appx. 10:30 pm

Report Over

EXHIBIT 3

CONCENTRA
MEDICAL CENTERS

EMPLOYER'S AUTHORIZATION FOR EXAMINATION OR TREATMENT

(MUST PRESENT PHOTO ID AT TIME OF SERVICE)

Patient Name: Sgt. Michael Ross SSN: [redacted]

Company Name: MD Reception Diagnostic and Classification

Date of Birth: [redacted]

Location #/Street Address: 550 E. Madison St. Baltimore MD 21202

Date of Injury: 6-21-07

Temporary Staffing Agency: -NA-

WORK-RELATED
✓ INJURY ___ ILLNESS
Post-Accident Substance Abuse Testing:
___ Drug Screen
___ Breath Alcohol
___ Drug Screen and Breath Alcohol
___ Urine Collection Only
___ DOT Regulated
___ Non-regulated

DOT PHYSICAL
___ Preplacement
___ Recertification
___ Exit
___ Audiogram
___ Regulated Drug Screen
___ Urine Collection Only
___ Breath Alcohol

PRE-PLACEMENT EVALUATION
Job Title: _____
___ Physical Exam
___ HPE
___ Regulated Drug Screen
___ Non-regulated Drug Screen
___ Urine Collection Only
___ Hair Collection
___ Audiogram

SUBSTANCE ABUSE TESTING
___ Regulated
Non-regulated
Urine Collection Only
___ Rapid Test
___ Pre-placement
___ Reasonable Suspicion
___ Random
___ Periodic
___ Post-accident
___ Follow-up
___ Breath Alcohol

SPECIAL PHYSICAL EXAMINATIONS
___ Asbestos
___ Respirator
___ Hazmat
___ Baseline
___ Other _____
_____

BILLING
___ Employee to pay charges at time of service
___ Workers' Compensation
Insurance Co: _____
Policy #: _____
Phone #: _____

Authorized By: Lt. James Madigan Title: Lieutenant

Phone: [redacted] Date: 6-22-07

These are the questions you will be asked concerning the injured employee(s):

Employer/Policy Verification:

Company Name & Address:
The Maryland Reception center
550 E. Madison Street, Baltimore, Maryland 21202

Policy Number: 911285

Name, position and telephone number of personnel reporting the injury:

James Madigan, Lt. [redacted]

Provider Information: At what provider clinic or hospital did the injured worker seek treatment?

Concentra-Downtown

Injured Worker's Information: Injured worker's last name, first and middle initial and phone #

Ross, Michael W. #[redacted]

Date of Injury and Time: 6-21-07 Social Security Number: [redacted]

Date of Birth: [redacted]

Address: [redacted] Gender: Male

Marital Status: Single Job title and Annual Salary: Sergeant, [redacted]

Date Hired: 7-16-86 Where did the incident take place: 7 corridor

Who was notified & what day: Capt. Calvin Vincent; G-22-07

Will they be paid for that day: yes

Injury description:

Part and side of the body affected:
Both knees

Brief description of how the injury occurred: While struggling to subdue Inmate Blake, Shidon #343-938, Sgt. Ross fell on both knees

Prior Work Injury:

Does the injured worker have any previous work injuries: none known

Lost Time Status

What was the last day worked: 6-21-07

DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
RISK MANAGEMENT ADMINISTRATION

WORK-RELATED INJURY –
CLAIM MANAGEMENT

SUPERVISOR INVESTIGATION REPORT

INSURANCE FRAUD IS A FELONY FALSE OR MISLEADING REPORTS OF INJURY VIOLATE THE DEPARTMENT'S STANDARDS OF CONDUCT

Name of Employee (Claimant): Ross Michael
Last First Middle

SSN: [redacted] Date of Injury: 6/21/07 Time of Injury: 945 AM [PM]

Injured Workers Insurance Fund Claim No. 6197400

Date of Investigation: 6/22/07 Time of Investigation: 310 AM [PM]

Important: Ensure that the claimant's "First Report of Injury (FROI)" and their "Acceptance or Waiver of Medical Evaluation" forms are completed and signed. Review the 'FROI' prior to starting your investigation. Interview the claimant at the time they report the claim. Witnesses named by the claimant on the 'FROI' should be interviewed separately and documented on the "Witness Statement"

Investigation (Narrative, attach photographs, use additional sheet as necessary):

On the above time and date, Sgt. Michael Ross was helping to subdue Inmate Blake, Shidon #343-938, while assisting the escort of that inmate to 7 Bravo. During the struggle, Sgt. Ross fell hard on both knees. He also complained of back pains

In your opinion, based on your investigation, is this claim valid? [Yes]/No

If "No", then please explain: _____

Signature/Title of Claimant's Supervisor Lt. James Madigan Date 6/21/07

Signature/Title of Investigator Lt. James Madigan Date 6/21/07

DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
RISK MANAGEMENT ADMINISTRATION

**WORK-RELATED INJURY –
CLAIM MANAGEMENT**

**ACCEPTANCE OR WAIVER OF
MEDICAL EVALUATION**

INSURANCE FRAUD IS A FELONY FALSE OR MISLEADING REPORTS OF INJURY VIOLATE THE DEPARTMENT'S STANDARDS OF CONDUCT

I, Michael Ross, an employee of the Maryland Department of Public Safety and Correctional Services, have reported a work-related injury or illness to my

employer in accordance with the *Secretary's Directive 04-90, Section VII. A. 1.*

My injury or illness, as determined by me, required 'first aid' treatment, which was offered to me, or provided to me at my request, by my employer.

My employer has offered me the opportunity for my injury or illness to be medically evaluated by a medical provider selected or accepted by the appointing authority.

I understand that my employer, at their discretion, may direct me for medical evaluation of my injury or illness to a medical provider selected or accepted by the appointing authority regardless of my choice to be or not to be medically evaluated.

Therefore, I choose to:

- ☐ **Waive medical evaluation for my injury or illness claim**
- ☑ **Be medically evaluated for my injury or illness claim**

Medical Provider: Concentra
Name of Physician, Hospital, or Clinic

Address: Baltimore, MD
City/State

Was the employee evaluated or treated in an emergency room? Yes/No

Was the employee hospitalized overnight as an inpatient? Yes/No

---

Claimant Signature: Michael Ross Date: 6/22/07

Witness Signature/Title:
Lt. James Madigan Date: 6/22/07

DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
RISK MANAGEMENT ADMINISTRATION

EMPLOYEE "FIRST REPORT OF INJURY"

INSURANCE FRAUD IS A FELONY FALSE OR MISLEADING REPORTS OF INJURY VIOLATE THE DEPARTMENT'S STANDARDS OF CONDUCT

Employee Name: Ross, Michael Warren
Last First Middle

Date of Injury: 6/21/07 **Time of Injury**: 955/AM/[PM]
Time Work Started: 248/AM/[PM]

Injured Workers Insurance Fund Claim No. 6197400 **(ALL CLAIMS)**

OSHA 300 Log Case No. ___ (IF A RECORDABLE INJURY/ILLNESS)

- What were you doing *prior* to the injury? at Lunch

- Please explain fully how this injury occurred, from the beginning to the end:

  at approximately 950/PM I was involved in a fight with inmate Blake, Shidon 343938 and I fell to the floor hitting both my knees on the floor hurting my knees and back.

- What caused your injury? me hitting the floor
- Where were you when the injury occurred? M.R.D.C. on 7 Corridor
- Who did you first report the injury to? Captain Calvin Vincent
- Who witnessed you being injured? No one
- Who is your immediate supervisor? Lieutenant James Madigan

Do you want to see a physician for medical evaluation of your injury? [**Yes**]/**No**

Note: **Please sign the 'Waiver or Acceptance of Medical Evaluation'** form in this packet.

Signature: Michael Ross *Date:* 6/22/07

INSURANCE FRAUD IS A FELONY FALSE OR MISLEADING REPORTS OF INJURY VIOLATE THE DEPARTMENT'S STANDARDS OF CONDUCT

Personal Information

SSN: [redacted] Sex: [M]/F DOB: [redacted]
Home Phone (410) [redacted]

Home Address: [redacted]
Street City State Zip

Marital Status: Married/[Single]/Divorced
No. of Dependent Children: [redacted]

Job Title: Correctional Officer Date Hired: 7/16/86
Bi-Weekly Salary $ [redacted]

Primary Care Physician: Unknown

- Address : _____
  Street City State Zip
- Phone : (___) _____
  Area Code

EXHIBIT 4

REGION Balt. FACILITY MDCC INMATE NAME Blake Shaidon

==========

Department of Public Safety and Correctional Services

RELEASE OF RESPONSIBILITY

I hereby acknowledge that I have been informed by appropriate medical personnel as to my medical condition.

(State nature of condition) State he was in physical altercation

Against the advice of said medical personnel, I refuse to have:

☐ Blood drawn _____

☒ Physical Examination [Illegible] physical altercation per security

☐ Medication(s) _____

☒ Other Medical evaluation per security request

I further acknowledge that I have been informed of the risks involved, and accept full responsibility for this action, and hereby release the attending physician and other health services staff from responsibility/ liability for any complications or undesirable results arising from my refusing the above stated treatment.

==========

Date: 6-21-07

Inmate Printed Name	*Signature*
Shaidon Blake *DOC#* 343938	Shaidon Blake
Witness # 1 Printed Name	*Signature*
[Illegible]	[Illegible]
Witness # 2 Printed Name	*Signature*
Calvin Vincent	Calvin Vincent

(A second witness is required if patient refuses to sign release)

EXHIBIT 5

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES
USE OF FORCE PACKET
[SEAL] **COVER SHEET**

DATE: June 21, 2007

TO: Acting Security Chief Rory Jones
Chief of Security/Executive Director/ Administrative Evaluation Committee (circle appropriate title)

FROM: Major Cherie N. Peay
Shift Commander/Bureau Chief/ Chief of Security (circle appropriate title)

RE: **Use of Force No.** 07-008

SUMMARY:

On June 21, 2007 inmate Shidon Blake 343938 was being transferred from unit 7 Charlie cell 22 to unit 7 Bravo cell 16. Sergeant Michael Ross restrained inmate Blake, Shidon from behind and attempted to escort him to 7 Bravo for Administrative Segregation status. Lieutenant James Madigan accompanied Sgt. Ross in the escort. As inmate Blake, Shidon was being escorted he told Lt. Madigan not to touch him and attempted to pull his arm away from Lt. Madigan. At this time a physical altercation escalated as Lt. Madigan percieved inmate Blake, Shidon to be a threat. Lt. Madigan believed that inmate Blake, Shidon had the potential to free himself from Sgt. Ross and become a physical threat to himself. Lt.

Madigan used his right forearm to strike inmate Blake, Shidon several times until Sgt. Ross was able to take inmate Blake, Shidon down to the floor seperating him from Lt. Madigan. Corporal Latia Woodard was assigned to 7 Corridor and called via radio for Officer Assistance.

FINDINGS/RECOMMENDATIONS:

In accordance with the Use of Force procedures, Reactive Use of Force was used as the situation quickly escalated to control the inmate. However in accordance with the Use of Force continuum, Confrontation Avoidance procedures were omitted and the Less than lethal force utilized is questionable to the level of force used needed to control the situation. Further investigation into this incident has been assigned.

SIGNATURE: Major Cherie N. Peay

[SEAL]

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES
USE OF FORCE REPORT

☒ DIVISION OF CORRECTION
☐ DIVISION OF PRETRIAL & DETENTION SERVICES
☐ DIVISION OF PAROLE & PROBATION
☐ PATUXENT INSTITUTION

	FACILITY	YEAR	SEQUENCE #
UOF #	MRDCC	07	008
SIR #	MRDCC	07	043

1. INSTITUTION/OFFICE: MRDCC
2. INCIDENT DATE/TIME: 6/21/07 @ 2:55 p.m. AM PM
3. SPECIFIC LOCATION OF INCIDENT: 7-C pod and 7 corridor

4. SENIOR RANKING STAFF ON SCENE:

NAME	RANK/TITLE	INJURY?	REPORT ATTACHED? Yes	REPORT ATTACHED? No	MEDICAL REQUIRED? Yes	MEDICAL REQUIRED? No	MEDICAL RECEIVED? Yes	MEDICAL RECEIVED? No
James Madigan	Lt.	none	☒	☐	☐	☒	☐	☒

5. ADDITIONAL STAFF INVOLVED:

Michael Ross	Sergeant	contusions to knees	☒	☐	☒	☐	☒	☐
Candis Fields	CO II	none	☒	☐	☐	☒	☐	☒
Latia Woodard	CO II	none	☒	☐	☐	☒	☐	☒
			☐	☐	☐	☐	☐	☐
			☐	☐	☐	☐	☐	☐
			☐	☐	☐	☐	☐	☐
			☐	☐	☐	☐	☐	☐

6. OFFENDERS/DETAINEES INVOLVED:

NAME	ID #	INJURY?	MEDICAL REQUIRED? Yes	MEDICAL REQUIRED? No	MEDICAL RECEIVED? Yes	MEDICAL RECEIVED? No
Shidon Blake	343-938	pain on left side of face	☒	☐	☒	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐
			☐	☐	☐	☐

7. LEVEL OF FORCE USED: ☐ Lethal ☐ Less Lethal ☐ Less than Lethal ☒ Physical Force Only/with Instruments
(check one)

8. IMPLEMENTS OF FORCE USED
☒ Hands, Feet, Defensive Holds, etc.
☐ Firearms
☐ Chemical Agents
☐ K-9
☐ Batons
☐ Pepper Spray
☐ Pepper Ball
☐ Stun Shield
☐ Other (specify):

TYPE OF FORCE EMPLOYED:
☐ Planned/Organized team response
☒ Spontaneous Response by Officer(s)

REASON FOR FORCE USED
☐ Self-Defense/Defense of Another
☐ Effecting an Arrest (DPP)
☐ Prevention of Suicide/Self Mutilation
☐ Prevention of Escape
☐ Destruction of Property
☒ Refusal of an Order
☐ Prevention of Crime
☐ Other (specify):

9. VIDEO RECORDED? ☐ Yes ☒ No
Videographer's Name: _____

PHOTOGRAPHED? ☒ YES ☐ NO
Photographed By: Cpl. Olushola Ajasa

10. Institutional Duty Officer/Supervisor Notified? ☒ Yes ☐ No
Name of Duty Officer/Supervisor Notified:

Notified By: Major Cherie Peay

11. Describe Property Damage (Use Additional Sheets if Necessary)
n/a

12. Shift Commander's/Supervisor's Review: /s/ Major Cherie Peay (RM) 6/21/07
Signature Date

Comments:
Assigned for Investigation? ☒ Yes ☐ No Investigator: Captain Calvin Vincent

13. Security Chief's/Bureau Chief's Review: /s/ Rory L. Jones 7/1/07
Signature Date

Comments: The amount of force used was not in compliance with the DPSCS Use of Force Manual.

14. Warden's/Exec Deputy Director's Review: _____ _____
Signature Date

Comments:

[SEAL] **DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES**

INVESTIGATOR'S SUMMARY

☒ DIVISION OF CORRECTION
☐ DIVISION OF PRETRIAL DETENTION AND SERVICES
☐ DIVISION OF PAROLE AND PROBATION
☐ PATUXENT INSTITUTION

TO: Rory L. Jones, Acting Chief of Security

FROM: Captain Calvin Vincent

INCIDENT (FIRM CATEGORY):

DATE: 5-21-07 TIME: 9:50 p.m.
LOCATION: 7 Corridor

EMPLOYEE REPORTS (Attached):

1. Name:	James Madigan	Title/Rank:	Lieutenant
2. Name:	Ronald Joyner	Title/Rank	Lieutenant
3. Name:	Michael Ross	Title/Rank	Sergeant
4. Name:	Olushola Ajasa	Title/Rank	Corporal07
5. Name:		Title/Rank	

DETAINEE/OFFENDER(S) STATEMENTS (Attached):

1. Name:	Shidon Blake	I.D. Number:	343-938
2. Name:		I.D. Number:	
3. Name:		I.D. Number:	
4. Name:		I.D. Number:	
5. Name:		I.D. Number:	

WITNESS STATEMENTS (Attached):

1. NAME: Cpl. Latia Woodard
2. NAME: Cpl. Candis Fields
3. NAME: _____
4. NAME: _____
5. NAME: _____

INJURY TO STAFF:

1. Name: Michael Ross Title/Rank: Sergeant
2. Name: _____ Title/Rank _____
3. Name: _____ Title/Rank _____
4. Name: _____ Title/Rank _____
5. Name: _____ Title/Rank _____

ADMINISTRATIVE DATA CHECKLIST:

	Yes	No	N/A
Serious Incident Report:	☒	☐	☐
Use of Force Report:	☒	☐	☐
Matter of Record:	☒	☐	☐
Witness Statement(s):	☒	☐	☐
Offender's/Detainee's Statement:	☒	☐	☐
Videotape:	☐	☒	☐
Medical Evaluation:	☒	☐	☐
Investigation Report:	☒	☐	☐
OBSCIS Printout:	☒	☐	☐
Notice of Infraction:	☒	☐	☐
Photographs:	☒	☐	☐

Other: _____

I.I.U. Notified: Yes ☒ No ☐ Time, Date & Person
2127, 06-22-07, Det. Sgt. Robert Fagan

Police Report #: 07-35-00868 IC Person Contacted:
Det. Sgt. Robert Fagan of IIU

SUMMARY/RECOMMENDATIONS:

On June 21, 2007 inmate Shidon Blake 343-938 was being transferred from unit 7 Charlie cell 22 to unit 7 Bravo cell 16, the segregation unit, because of his attempt to rile inmates housed on 7-C relative to using the inmates' telephones. Earlier, inmate Blake was reported to have said to inmates, in a belligerent tone, that they, as inmates, could control who uses the inmates' telephones. Because of this, he was being placed on administrative segregation. The inmate was handcuffed from behind while being escorted by Sgt. Michael Ross and refused to allow Lt. James Madigan to take hold of him to assist Sgt. Ross in the escort by snatching away from Lt. Madigan when Lt. Madigan attempted to grab his arm. It is reported by Cpl. Candis Fields that Lt. Madigan shoved inmate Blake down the pod stairs as Sgt. Ross was escorting the inmate. Corporals Fields, Latia Woodard, Sgt. Ross and Lt. Madigan all admit that the inmate was hit in his face by Lt. Madigan though the number of strikes and the position of the strikes vary to some degree. As the scuffle entered the seventh floor corridor Officer Woodard call for assistance, via two-way radio. As the response team arrived, inmate Blake was sitting on the floor of 7 corridor, again, with his hands cuffed from behind as Sgt. Ross stood over him while Lt. Madigan looked

on. The area was deemed secured and the inmate was taken to the medical department where he was superficially examined because he refused treatment. He signed a medical waiver form. There was no apparent injury to the inmate. However, Sgt. Ross sustained contusions to his knees as a result of falling in the scuffle. Internal investigation unit was notified the following day and assigned case number 07-35-00868 IC.

Though Lt. James Madigan wrote in his report that he feared for his safety, I conclude that the risk to his safety was negligible at best. I further conclude that the situation was escalated by Lt. Madigan's rigidness not to heed the request, then demand, of the inmate as well as Sergeant Michael Ross's comment that he, Sgt. Ross, had the inmate under control. In short, the event could have been avoided. Therefore, I recommend that Lt. James Madigan receive fifteen days suspension or forfeiture of the 120 hours of annual leave and/or mandatory use of force training.

SIGNATURE: Capt. Calvin Vincent 6/21/07

[SEAL] DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
USE OF FORCE EVALUATION REPORT

☐ DIVISION OF CORRECTION
☐ DIVISION OF PRETRIAL &
DETENTION SERVICES
☐ DIVISION OF PAROLE & PROBATION
☐ PATUXENT INSTITUTION

UOF #	MRDCC	07	008
	FACILITY	YEAR	SEQUENCE #
SIR #	MRDCC	07	043
	FACILITY	YEAR	SEQUENCE #

INSTITUTION/OFFICE: MRDCC INCIDENT
DATE/TIME: 6/21/07 10:00PM AM PM

SPECIFIC LOCATION OF INCIDENT: _____

INCIDENT INFORMATION

	Yes	No
Was the level and type of force appropriate?	☐	☒

If "No," comment:

According to all reports and the investigation it was deemed Lt. James Madigan used excessive force in assisting Sgt. Michael Ross escort inmate Shidon Blake #343938 off of housing unit 7Charlie. Lt. James Madigan struck inmate Blake in the face four (4) times while inmate was handcuffed from the back.

If there was an injury, visible or complained of, to an offender/detainee, was the injury consistent with the force used? If "No," comment:	☒	☐
Was required medical evaluation completed? If "No," comment:	☒	☐
Is there documentation of an opportunity for voluntary compliance? If "No," comment:	☒	☐
Was there proper use of protective gear? If reactive use of force, mark N/A. If "No," comment:	☐	☐
N/A		
Was there proper and continuous use of the video camera in a planned use of force? If "No," comment:	☐	☐
N/A		
Was the force used consistent with policy, procedures and the Use of Force Continuum? If "No," comment:	☐	☒
According to all reports and the investigation, there was excessive force used on inmate Shidon Blake #343938		

Other Comments:

Lt. James Madigan has been placed on Administrative Leave pending termination

EXHIBIT 10

STATE OF MARYLAND
DEPARTMENT OF BUDGET & MANAGEMENT
OFFICE OF PERSONNEL
SERVICES AND BENEFITS
301 WEST PRESTON STREET
BALTIMORE, MD 21201

UNSATISFACTORY REPORT OF SERVICE

EMPLOYEE NAME: Madigan James Joseph [redacted]
(LAST) (FIRST) (MIDDLE) (Social Security No.)

CLASSIFICATION: Correctional Officer Lt.

SEPARATED FROM: **Maryland Reception Diagnostic & Classification Center 3502030004**
(Unit) (Appropriation Code)

SEPARATION WAS (check, as appropriate):

☒ Resignation ☐ Resignation Without Proper Notice

☐ Resignation in Lieu of Termination

Termination Without Prejudice

☐ Termination With Prejudice Other:

EFFECTIVE DATE OF SEPARATION 07/13/2007

Explain the need for this unsatisfactory report:
Please remove the MS106 filed 07/13/07; employee resigned effective 07/13/07.

Copy to Employee: ___ **Copy delivered in person**
X **Copy mailed to the following home address:**

[redacted]

REPORT
FILED BY: Felicia M. Hinton [FMH] Warden
(Appointing Authority) (Title)

DATE: 01/30/08

APPEAL RIGHTS: An employee may submit a written request to change an unsatisfactory report to the Department of Budget and Management, 301 West Preston Street, Baltimore, Maryland 21201, within 30 calendar days of receipt. The Secretary of Budget and Management or the Secretary's designee may modify or correct any inaccurate or incomplete information on the unsatisfactory report the appointing authority or the head of the principal unit who filed the report shall have the authority to rescind the report.

DEPARTMENT OF BUDGET AND MANAGEMENT USE ONLY

ACTION: _____ **DATE OF ACTION:** _____
EXPIRATION DATE: _____

MARYLAND POLICE AND CORRECTIONAL
TRAINING COMMISSIONS
3085 Hernwood Road Woodstock, MD 21163-1099
Voice: (410) 750-6500 Fax: (410) 203-1010

NOTICE OF PERSONNEL ACTION
MANDATED CORRECTIONAL PERSONNEL

NOTE: Information submitted to MPCTC is subject to the Public Information Act (State Gov't Art., §10-611 *et seq.*), and is not bound by agreements made by correctional units, mandated correctional personnel, or others about the confidentiality of this information.

Last Name: Madigan First Name: James MI J

Certification Number: [redacted]

Name of Agency: THE MARYLAND RECEPTION DIAGNOSTIC AND CLASSIFICATION CENTER

Date of Action: 07/13/07 Rank: CO LT.
Classification: CO X CC __ IS __ P&P Agent __ DDM __

Is the individual authorized the use of a departmental firearm: Yes x No __

FOR DPSCS TRANSFER ONLY
Use this box to indicate transfer of mandated personnel between agencies in the DPSCS.
Transfer From: _____
Transfer To: _____

Please indicate all statements which describe the personnel action taken. An explanation of the action may be attached.

1. Name Changed To: _____

2. Resignation x OR Retirement ____
   __A. General, without prejudice.
   __B. While under administrative charge or investigation.
   __C. While under criminal charge or investigation.

3. Assign to Non-Officer status:
   __A. Medical/injury, military
   __B. Department suspension due to administrative charge or investigation.
   __C. Department suspension due to criminal charge or investigation.
   __D. Other: _____

4. __Returned to active duty status from Non-Officer status.

5. __Involuntary termination of employment.

6. Promotion:
   __A. To first line supervisor (first line supervisor training required).
   __B. Over the rank of first line supervisor.
   __C. To first line administrator (first line administrator training required).

7. __Demoted.

8. __Deceased.

I certify that to the best of my knowledge the above information is accurate.

Felicia M. Hinton	Felicia M. Hinton	01 30 08
(Printed/Typed Name)	(Signature)	(Date)

State of Maryland Department of Budget and Management OPS & B 301 W. Preston St. Baltimore, Maryland 21201	**Appointing Authority** Process Date Print Date 7/16/2007 Print Time 1:52 pm	01 [Illegible] ID 052370 0	Authorized Type 01

[Illegible] Action Description and Reason Code 617 Terminated – ES – Without Prejudice	Doc Dist PY	Department Name MD RECEPTION, DIAGNOSTIC AND

Position Status	03 Employee Status	04 Class	Class Title
Filled	SS – Skilled Service	4083	CORR OFFICER LIEUTENANT
	SS – Skilled Service	4083	CORR OFFICER LIEUTENANT

05 Social Security	06 Last Name	07 First Name	08 M.I.	10 Sex	11 Birth Date	County 12 Res	13 Emp
[redacted]	MADIGAN	JAMES		M	[redacted]	[redacted]	31
[redacted]	MADIGAN	JAMES		M	[redacted]	[redacted]	31

14	15 Step	16 Salary	Sal	49	17 Pct	18 Days per pay/Pays per	19 Norm	20 Sub	21 Payroll	23
0016	014	[redacted]	M	OT	100	10-26	80.0	420	1	421
0016	014	[redacted]			100	10-26	80.0	420	1	421

24 Prev Agy Code	25 Prev PIN	26 Inc	27 Inc	28 Entry on	30 Chk Dst	31 Ret Sys	32 Date Pos Est	33 Exp Date TE/EM/CE
350203000		07	2008	7/26/1989	004	02	7/1/1980	
350203000		07	2008	7/26/1989	004	02	7/1/1980	

35 Auth Pct	36 Fund Codes	37 Funding	38 Agency Code	NOTE: Changes to boxes 35 thru 38 require Budget Approval	41 Eff Date	42 Rev
100	01 00 00	100 000 000	350203004		7/1/2007	Mass
100	01 00 00	100 000 000	350203004		7/13/2007	

39 Action Code	Last Personnel Action Taken This Position	48 Bargaining Status
97S	SALARY ADJUSTMENT AND INCREMENT	NS
617	Terminated – ES – Without Prejudi	NS

Signature of Appointing Authority	Date	Agency Prime Contact Name, Fax and Phone No.
		Mary Chambers, 410-878-4108

Program Change ☐ Fund Change ☐ Abolish Position ☐ Abolish/Create Position ☐

45 Race/Ethnic Identification: Select one or more of the following racial categories:	09 Race 015	45A Verification of this Person's possession of the minimum qualification for this
☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Hispanic or Latino ☐ Native Hawaiian or other Pacific Islander ☒ White or Caucasian		[No] Been Completed, or [No] Been initiated and will be completed prior to the end of the probationary

BUDGET & MANAGEMENT USE ONLY			DBM AUTH. SIGNATURE Date
	☐ APPROVED	B.A. Date	
	☐ DISAPPROVED	C.B.A. Date	

Classification	AUTHORIZED CODE AND TITLE	Authorizing Signature

OPS & B USE ONLY

Memorandum of File Closure

Date: January 29, 2008
Employee: James Madigan, Correctional Officer Lieutenant, (MRDCC)

1. *State Personnel and Pensions Article*, §11-105(l)(iii) Intentional conduct without justification, that seriously threatens the safety of the workplace

2. *State Personnel and Pensions Article*, §11-105(8) Wantonly careless conduct or unwarranted excessive use of force in the treatment of an individual who is a client, patient, or prisoner, or any other individual who is in the care or custody of the State.

3. *COMAR* 17.04.05.04B(1) Being negligent in the performance of duties;

4. *COMAR* 17.04.04.05B(2) Engaging in intentional misconduct, without justification, which injures another person, causes damage to property, or threatens the safety of the workplace;

5. *COMAR* 17.04.04.05B(3) Being guilty of conduct that has brought or if publicized, would bring the State into disrepute;

6. *COMAR* 17.04.04,05B(4) Being unjustifiably offensive in the employee's conduct toward fellow employee's, wards of the State, or the public;

7 *COMAR* 17.04.05.04B(10) Willfully making a false statement or report;

8. *COMAR* 17.04.04.05B(12) Violating a lawful order or failing to obey a lawful order given by a

superior, or engaging in conduct violating a lawful order, which amounts to insubordination;

9. DPSCS *Standards of Conduct*, Section II. B. Personal Conduct;

10. DPSCS *Standards of Conduct*, Section II. J. Performance of Duties;

11. DPSCS *Standards of Conduct*, Section II. K. Insubordination;

12. DPSCS *Standards of Conduct*, Section II.S Reports;

13. DPSCS *Standards of Conduct*, II.M. Breach of Security;

14. DPSCS *Standards of Conduct*, II.X. Attitude toward Inmates and Clients;

15. DPSCS *Standards of Conduct*, II.Y. Use of Force

16. DPSCS *Standards of Conduct*, IV.E.2.a.(9) Insubordination;

17. DPSCS *Standards of Conduct*, Section IV.E.2.a.(14) Filing a false report;

18. DPSCS *Standards of Conduct*, Section IV. E. 2. a (15) Directing cruel or harsh treatment (not resulting in harm) towards inmates;

19. DPSCS *Standards of Conduct*, Section IV.E. 3. a 7 Use of force which could reasonably be expected to result in serious bodily harm or death;

20. DPSCS *Standards of Conduct*, Section IV.H.1. Exceptional Information;

Correctional Officer Lieutenant James Madigan made a determination to "Resign from the Department of Public Safety and Correctional Services" effective *July 13, 2007*.

***NOTICE TO PERSONNEL OFFICER:* In order to protect this resigning employee and the Department, you are requested to execute the following services:**

1. Provide a neutral reference – consisting of the position, classification, and dates of employment to all prospective Employers, outside of the DPSCS.

2. Purge the above listed charges and any reports, memoranda, etc. related to this incident, from his personnel file in accordance with *SPP* § 11-109(f), in seven work days from the date of receipt.

3. Upon receipt of any request from a potential employer to review the personnel file, temporarily remove the Settlement Agreement from the file. After the examination of the personnel file, return the Settlement Agreement.

4. After the Personnel Officer has effectively removed any indications of a "TERMINATION," from the employee's file and put in place the process to offer item number one (1.) he/she shall immediately fax this sheet back to Hearing Officer

---

~~25~~ 13 [KK] July 2007

To: Felicia M. Hunton, Warden
From: James J. Madigan, Lieutenant-3-11 Shift
Subject: Letter of Resignation

Ma'am:

This is to inform you that I resign from my state of Maryland position as of the above date.

Respectfully submitted,

/s/ James Joseph Madigan

James Joseph Madigan

Approved

/s/ Warden Felicia M. Hinton

1/29/08

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

DISCIPLINARY ACTION SETTLEMENT AGREEMENT

The Department of Public Safety and Correctional Services (hereinafter, DPSCS), by and through its representative, Katherine Kennedy, and DPSCS employee, James Madigan do hereby agree to a settlement of Mr. Madigan's termination, as follows:

Mr. Madigan was charged with violating *State Personnel and Pensions Article*, COMAR and the *Standards of Conduct*, for "engaging in intentional

misconduct, without justification, that seriously threatens the safety of the workplace; wantonly careless conduct in the care and custody of an inmate and excessive use of force which could reasonably be expected to result in serious bodily harm or death"

The Employee and DPSCS acknowledge that DPSCS has the absolute right to impose a disciplinary sanction for the alleged misconduct/performance issue(s). The Employee and DPSCS also acknowledge that the Employee has the absolute right to pursue his appeal to the Office of the Secretary of DPSCS, Office of Personnel Services and Benefits, with the Department of Budget and Management ("DBM"), and have a hearing on the merits of his appeal at the Maryland Office of Administrative Hearings ("OAH"). At a hearing on the merits, DPSCS would have the burden of proving by a preponderance of the evidence that the Employee committed the acts alleged.

Pursuant to the provisions of Md. Code Ann., *State Personnel and Pensions Article* § 11-108(c), the Employee and DPSCS hereby agree to a settlement of his termination. As a settlement, DPSCS agrees to accept Mr. Madigan's resignation. Employee agrees to submit his resignation effective July 13, 2007 Employee agrees to submit his resignation to Warden Felicia Hinton. Employee agrees to waive his right to grieve the resignation.

DPSCS agrees to provide neutral references to all potential employers outside of DPSCS, full disclosure will be provided within DPSCS and the MS-106 will

be amended to reflect that Employee resigned. Employee agrees not to apply for any position within DPSCS.

If either party breaches any portion of this agreement, the non-breaching party may void this entire agreement. In the event that the Employee breaches the agreement, DPSCS reserves the right to reinstate the original disciplinary sanction of termination and the Employee's right to appeal the termination shall be considered waived. In the event that DPSCS breaches the agreement, the Employee reserves the right to pursue his appeal of the original disciplinary sanction and DPSCS' right to raise the issue of the timeliness of the appeal shall be considered waived.

Additionally, the parties intend the contents of this document to be the complete and final expression of their agreement to settle James Madigan's disciplinary sanction. Accordingly, this agreement is FINAL, BINDING, AND NOT SUBJECT TO APPEAL.

I HAVE HAD THE OPPORTUNITY TO CONSULT WITH THE COUNSEL/REPRESENTATIVE OF MY CHOICE REGARDING THIS SETTLEMENT AGREEMENT. I HAVE READ THIS AGREEMENT AND ENTER INTO IT FREELY AND VOLUNTARILY. WITHOUT PROMISES OR INDUCEMENTS OF ANY KIND EXCEPT THOSE CONTAINED IN THE AGREEMENT ITSELF.

/s/ James Joseph Madigan EMPLOYEE	1-28-08 DATE
/s/ Kathleen Kenealy EMPLOYER REPRESENTATIVE FOR DPSCS	1/28/08 DATE
/s/ [Illegible] WITNESS	1/28/08 DATE

cc. Warden Felicia Hinton
MRDCC Personnel
ERU

EXHIBIT 12

[SEAL] **Department of Public Safety and Correctional Services**

Internal Investigative Unit
P.O. BOX 410 • 8510 CORRIDOR ROAD • SUITE 100 •
SAVAGE, MARYLAND 20763-0418 •
www.dpscs.state.md.us
GENERAL BUSINESS (410) 724-5720 • FAX (410) 724-2084 • COMPLAINT REPORTING (410) 724-5742 • FAX (410) 724-2008

Date: 6/22/09 **IIU Case No.** 07-35-00868

I, Shidon Blake 343938 have been involved in an
(Full name & DOC Number)

incident that was reported to the Department of Public Safety and Correctional Services

Internal Investigative Unit. I am now requesting that no investigation be conducted. By signing this statement, I am requesting that no further investigative action be taken on this complaint and that the matter be considered CLOSED. This statement is being signed freely and voluntarily with no threat or coercion being used against me to sign this statement.

Signed: /s/ Shaidon Blake 343938

Date: 9-26-08

Witness: John Iheoma
(DPSCS-IIU Investigator)

Witness: D.T. Thomas LT 9-26-08

NORTH BRANCH CORRECTIONAL INSTITUTION
Intelligence Department
14100 McMullen Highway, SW
Cumberland, MD 21502

facsimile transmittal

To: Detective Sgt. John Iheoma Fax: [redacted]

From: Lt. D.T. Thomas-Intel, NBCI Date: 09-26-08

Re: Shidon Blake #343938 Pages: 2

CC: CASE # 07-35-00868

☐ Urgent ☒ For Review ☐ Please Comment
☐ Please Reply ☐ Please Recycle

Notes: John,

Here is the Faxed copy. I will mail you the original. Thanks.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

SHAIDON BLAKE, aka SHAMVOY SMITH, Plaintiff, v. GARY MAYNARD, et al., Defendants	Civil Action No. AW-09-2367 Greenbelt, Maryland Friday, November 2, 2012 4 o'clock p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE
ALEXANDER WILLIAMS, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
SCOTT A. CLAFFEE, ESQ.
Mayer Brown, LLP
1999 K Street, N.W.
Washington, D.C. 20006

FOR DEFENDANT ROSS:
DORIANNE AVERY MELOY, ESQ.
Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202

FOR DEFENDANT MADIGAN:
DOUGLAS T. SACHSE, ESQ.
606 Baltimore Avenue, Suite 402
Towson, Maryland 21204

[2] PROCEEDINGS

THE DEPUTY CLERK: The matter now pending before this court is civil action number AW-2009-2367, Shaidon Blake v. Gary Maynard, et al. The matter now comes before this court for a motions hearing. Parties please identify yourselves for the record.

MR. CLAFFEE: Scott Claffee of Mayer Brown, LLP, for plaintiff Shaidon Blake.

THE COURT: All right.

MS. MELOY: Dorianne Meloy for the Office of Attorney General on behalf of defendant Ross.

THE COURT: All right.

MR. SACHSE: Your Honor, Douglas Sachse on behalf of defendant Madigan.

THE COURT: All right. Mr. Claffee, it's your motion. I thought you raised some interesting issues and I thought that we would set it in for a hearing and give you a chance to tell me where we've erred. We're going to hear you and we'll let the other parties come back and then we'll see what we're going to do with it.

MR. CLAFFEE: Thank you, Your Honor.

Good afternoon. May it please the court. We are here on our motion for reconsideration of Your Honor's memorandum opinion granting summary judgment to defendant Ross. There are three issues with the opinion, respectfully, that we think [3] warrant reconsideration as either errors of law or to prevent manifest injustice. The first is the court's dismissal of defendant Madigan. The second is the ruling that the IGO process was an available remedy that Blake had to exhaust. And the third is the denial of our motion to strike the exhaustion defense in light of the prejudice that has resulted in the related issue of whether if our motion to strike is denied Your Honor should stay or equitably toll this case while Blake proceeds to exhaust the IGO process.

Now, with respect to the first issue of defendant Madigan, we believe it was a mistake to close the entire case, including Blake's claims against defendant Madigan, who is probably the most egregious offender in the original incident giving rise to this case. Madigan did not move for summary judgment and has not filed any papers addressing any of the issues decided in Your Honor's memorandum.

We submit, then, that it was inappropriate to close the case against him for that reason alone. Because Madigan has never raised the exhaustion defense, Blake has never addressed it with respect to Madigan and we believe such a defense is unavailable to him and would likely fail, in any event.

Blake is prepared to proceed to trial against defendant Madigan or if the court decides to stay the case against Ross so that Blake can exhaust, we would agree to a stay also against Madigan so that the two trials could be combined.

[4] With respect to exhaustion of the IGO process, we think there are two interpretations of the interplay between the IGO process and the ARP process, but Blake believes that he wouldn't have to exhaust under either interpretation. The first is that the IGO process is completely separate from the ARP process and that the ARP process is the only process that prisoners in Maryland should have to exhaust.

THE COURT: And what is that process? Just again walk me through that, because I'm not quite familiar. What is that process?

MR. CLAFFEE: Sure. The Administrative Remedy Process is the process that is defined by the state of Maryland as the process for resolving complaints and grievances that arise within the Division of Corrections, and then the state set up the IGO process as a completely separate agency from the Division of Corrections. So, we think that if you read the Supreme Court's decision in Jones that says its up to the state and the prison system to define what administrative remedy procedures are available, here Maryland set up the ARP process. They defined it in the materials that they make available to inmates in the handbook and in the Division of Corrections directives as that ARP process.

THE COURT: And what does that require the aggrieved party to do in the handbook –

MR. CLAFFEE: In the handbook it requires –

[5] THE COURT: – that's relevant to these facts?

MR. CLAFFEE: Okay. Sure. Well, in these facts we don't believe that Mr. Blake would have to proceed through that process at all because if –

THE COURT: Going to the warden? He didn't have to go to the warden?

MR. CLAFFEE: No. Because it was the subject of an internal investigation by the IIU unit, we believe that he would not have been able to even file a grievance under the ARP process and proceed to the warden or the appeal to headquarters.

THE COURT: And what is your authority for saying that that particular process is independent and also obviates the need for the aggrieved party to go through the handbook process? What's your authority?

MR. CLAFFEE: The authority that the internal investigation –

THE COURT: Yes.

MR. CLAFFEE: – prevents – the authority for that –

THE COURT: Or waives or gives up or excuses. Yes.

MR. CLAFFEE: Sure. The authority for that is both in this court's opinion in Thomas, relying on, I believe it was, Davis in a footnote in that case.

THE COURT: These are unreported decisions?

MR. CLAFFEE: Yes, that's correct. And, in addition, I believe there's – although not at the time, it is now written [6] into the directives that – I'm sorry. One second, Your Honor. I believe under the 2008 version of the directives now but not the version that applied to Mr. Blake –

THE COURT: And the 2008 version I inadvertently cited as –

MR. CLAFFEE: Correct.

THE COURT: – applying at that time, that was not in existence at the time?

MR. CLAFFEE: No, it was not at the time.

THE COURT: What was in existence? The handbook?

MR. CLAFFEE: The handbook was in existence and the 1993 version of the directives as well as a 2005 directive that I believe counsel for defendant Ross plans to bring to your attention, but –

THE COURT: And what did that suggest or what did that say about exhaustion on these issues?

MR. CLAFFEE: They're really, Your Honor, silent. Neither the '93 version of DCD 185-205 or the 2005 version of DCD 185-002, they are both silent on the internal investigation process entirely.

THE COURT: Okay.

MR. CLAFFEE: So, to go back, we believe that by Maryland establishing the ARP process and setting up the IGO as a separate agency, all of the materials such as the handbook and the directives, they talk about the IGO process almost akin to [7] filing a court case following the exhaustion of the ARP process. So, we believe that you can interpret how Maryland defines the ARP process as that being the administrative remedies that are required to be exhausted under the PLRA.

THE COURT: Are there any other circuits – not the Fourth Circuit but any other circuits that have addressed any of this at all?

MR. CLAFFEE: Frankly, Your Honor, I don't believe so, and it's my understanding that having a separate agency to receive inmate grievances such as the IGO in Maryland is sort of a unique situation. I believe Maryland may be – I can't say for sure but may be one of the only states that has it set up like that with a separate agency not within the overall umbrella of the Division of Corrections.

THE COURT: And the Fourth Circuit has not addressed this specifically?

MR. CLAFFEE: That's correct.

THE COURT: All right. And so, you're arguing essentially your interpretation and your belief that it's a separate vehicle and also the unreported decisions that you have brought to my attention?

MR. CLAFFEE: That's correct. And that's just the one interpretation. We believe there is another interpretation, and this is reflected in Your Honor's opinion that the IGO could possibly be part of the overall administrative remedy process. [8] But if that's the case, all of the materials, the handbook and these directives, they all talk about the IGO process as an appellate step within the ARP process to be completed only after the ARP process has been exhausted, including all the way up to a headquarters appeal of the warden's decision.

So, in Blake's case, he could not have gone through that process because the internal investigation, again, took that out of the normal ARP complaint, appeal to the warden, appeal of the warden's decision to the headquarters, that process.

So, we would submit, then, that if Blake couldn't have gone through the ARP process, he couldn't have gone through the IGO because the IGO is set up only for appeals from the ARP process in these types of cases. There are some instances where you can go

directly to the IGO, but those are limited to – counsel for Ross cited some in his motion for summary judgment – things like case management actions and things like that. If its a use of force issue, its ARP first or internal investigation that takes it out of ARP, but you can't go right to the IGO.

THE COURT: All right.

MR. CLAFFEE: So, regardless of how Your Honor thinks the IGO and ARP regulations should be interpreted, Your Honor can avoid sort of weighing in on that by finding that Ross waived his exhaustion defense. I understand that Blake's [9] prejudice argument was found lacking at the time Your Honor decided his motion to strike but now that the court has also ruled against Mr. Blake on summary judgment, the prejudice here is obvious because Blake will be unable to refile his complaint even if he goes and exhausts the IGO process due to the statute of limitations unless the court stays the action or rules that there should be an equitable tolling of the statute.

THE COURT: All right. Let me follow up on that. You're suggesting that this court stay the action as to Ross while you pursue what?

MR. CLAFFEE: If the court's ruling stands that Blake failed to exhaust because he didn't go through the IGO process, Blake would file a grievance with the IGO office. In fact, Blake already did file a grievance with the IGO office back in June following Your Honor's order.

THE COURT: June of this year?

MR. CLAFFEE: June of this year. That's correct.

THE COURT: So, one has been filed?

MR. CLAFFEE: One has been filed and –

THE COURT: What has happened to it?

MR. CLAFFEE: It has been dismissed without prejudice pending the resolution of our –

THE COURT: This motion for reconsideration?

MR. CLAFFEE: – motion for reconsideration. Exactly. I've spoken with the director and our understanding is that he [10] wanted to wait and see – if Your Honor reconsiders the ruling on whether the IGO process was even necessary, that would moot the grievance, and if Your Honor's decision stands, then he will reopen the grievance that we filed in June and we expect it would be administratively dismissed rather quickly and we could come right back here before Your Honor if the case was stayed during that brief process.

So, just briefly to address the prejudice, to remind Your Honor of the time line, this incident took place in June 2007 The IIU closed their internal investigation – it wasn't completely closed until September 2008. Blake filed his complaint in September 2009. So, it was a bit over two years after the

incident but still well within the three-year statute of limitations.

Now, defendant Ross filed an answer right after the complaint was filed in November of 2009 and filed a motion to dismiss or for summary judgment that February, February 2010. In neither of those, the answer or the first dispositive motion, did Ross raise the exhaustion defense and to date has still not explained why not, despite the fact that the state had all of the information relevant to whether or not an exhaustion defense applied at the time of that answer and motion.

THE COURT: Well, at some point wasn't there a consent?

MR. CLAFFEE: I'm sorry?

THE COURT: At some point wasn't there a consent by the [11] plaintiff to permit such an amended defense?

MR. CLAFFEE: Much later, Your Honor. And we would argue there wasn't consent to the filing of this particular defense. In fact, we consented to the amendment of an answer, but we were never shown a draft answer and we were not given any indication that additional dispositive defenses were going to be raised in that answer.

And I do want to briefly mention that – Your Honor mentioned that the appropriate way for Blake to have proceeded in that case would have been to file a partial opposition to the consent motion, but I

wanted to just point out that Your Honor granted that motion to file the amended answer the next day after it was filed. So, after receiving the amended answer and seeing that that defense was in there, Blake wouldn't have had any time to file a partial opposition anyway because the motion had already been granted. So, we believe the only proper – the only avenue available to Blake at that point was to file the motion to strike, which we did within the 21-day time limit provided by the federal rules.

So, going quickly back to the time line, if Ross had raised the exhaustion defense either in the answer or in his first motion in February 2010 and the court had ruled on it at that time, Blake still could have gone and exhausted and refiled his complaint prior to the expiration of the statute of limitations in the summer of 2010. So, Ross makes a big deal [12] out of the fact that it was Blake's own inaction that caused this prejudice but, really, the only thing that caused the prejudice that were talking about now, which is the fact that Blake wouldn't be able to refile due to the statute of limitations, is the fact that Ross waited until after the expiration of the statute of limitations to even raise the exhaustion defense. That's the only reason why this is an issue right now.

So, in order to prevent what we see as this grave injustice and allow Blake to have his day in court against both defendants Ross and Madigan, we think that Your Honor could either stay the case or rule that the statute of limitations should be tolled while

Blake goes and completes the exhaustion if Your Honor finds the IGO process necessary to exhaust. As I said, the IGO would reopen the grievance that we filed in June. We think it would be administratively dismissed rather quickly and we could be right back in front of Your Honor to either relitigate the merits of defendant Ross's summary judgment motion or proceed to trial, discovery having been closed in this case, and we are prepared to go to trial against both defendants Ross and Madigan if Your Honor sees that appropriate.

THE COURT: All right.

MR. CLAFFEE: Thank you, Your Honor.

THE COURT: Thank you. All right. We'll hear from Ms. Meloy. Ms. Meloy, how are you? I haven't seen you in a [13] while.

MS. MELOY: I'm fine. I just joined the AG's office about 11 weeks ago from Prince George's County.

THE COURT: Isn't that something? Yes. All right. Great.

MS. MELOY: So, its nice to be here.

Your Honor, I've been in this case about 15 days. So, I have spent quite a bit of that time trying to familiarize myself with the case and provide a response to the court. So, I'd ask the court to bear with me a little bit due to the brief period of time that I have been involved.

First of all, plaintiff has failed to meet its burden to the court that that Rule 59(e) standard has been met in this case. There was no clear error of the law in the court's ruling and there is no manifest injustice in this matter. There certainly is no intervening change and controlling of law in this case.

First I'd like to address with the court the issue of the motion to strike because that sort of puts us procedurally before the court on the issue of the failure to exhaust.

As the court noted, the amended answer was timely filed and, pursuant to Young v. City of Mount Rainier, that amended answer was appropriate.

I'd also like to point out to the court in reviewing the file that at the time that a discussion was had on the [14] earlier complaint, the first complaint that is no longer viable before this court, and that consent motion to leave to amend the defendant's answers, the e-mail that was attached to the pleading in that case indicated – and that is, I believe, document 78 before the court – that counsel got a quid pro quo by consenting to that amended answer and that was that he would have the ability to file without objection an amended complaint. So, when we sort of look at the overall fairness, that amended answer isn't even viable or controlling in this case. But if it were, Mr. Blake, in fact, got a benefit from that consent that he gave.

Further, counsel has cited a matter before the court indicating that if the – asserting that his

amended complaint didn't change the theory or scope of the case against Ross, and that simply is not accurate. The plaintiff's amended complaint at document 78-1, in fact, added some very specific claims against defendant Ross at paragraph 4. It added the words "Over an extended period of time" in front of what had previously been "Sergeant Ross made no attempts to stop the attack." It added "despite my repeated pleas for assistance" in front of what had previously been "The officer assigned to Hall called the officer's assistance." It then added for the first time "Sergeant Ross and Lieutenant Madigan took me to the ground in a violent manner. Sergeant Ross acted with callous and reckless disregard for my rights."

[15] He also added at paragraph 6 that he's stating to hold Sergeant Michael Ross and James Madison responsible for his injuries.

Having had an opportunity to review the complaint and to review some of the depositions in this matter, the theory against Sergeant Ross is one either of actual affirmative action when Mr. Blake was taken to the ground and for the first time that is alleged in the amended complaint and what had previously been alleged was insufficient to withstand a motion for failure to state a claim in support of an act on Sergeant Ross's part as a failure to intervene in behalf of what actions Officer Madigan took or Lieutenant Madigan took and that you have to be aware a constitutional violation is occurring and you have to have sufficient and adequate time to be able

to act to stop the harm. So, it did change the theory and scope of the case significantly in terms of Ross's liability in this matter.

So, for that reason as well, the amended answer and the amended complaint are the viable ones before the court and they were timely. Therefore, the affirmative defense of exhaustion was properly raised before the court at that time.

THE COURT: Again, what's bothering me a little bit is that it just seems that the defense could have or should have anticipated raising such a defense much earlier than that. It seems to me one of the defenses that people should quickly throw in whether its applicable or not, and this thing came kind of [16] late in the game despite the amended complaint, which, in a sense, since it was late, it did then prevent me from causing the plaintiff to go back and exhaust because, again, the statute had run or was about to run.

So, I'm a little concerned about what appears to be a little unfairness, because I could have ruled very quickly as to whether it was viable or not and so forth.

That's what's concerning me right now. What do you have to say about that, Ms. Meloy?

MS. MELOY: Well, Your Honor, I was not counsel previous to 15 days ago in this case.

THE COURT: All right.

MS. MELOY: When Ms. Rice became counsel in this matter and reviewed the file, she ultimately made contact with counsel to file that amended complaint or amended answer and got consents back, and the plaintiff in this case by that got an agreement by our office on behalf of Mr. Ross to be able to amend his complaint. His complaint would not have withstood scrutiny for a motion for summary judgment or at the end of trial and Officer Ross would have also been prejudiced by an amended complaint that late in the game. So, counsel has – through Mr. Blake has waived that argument and also received a benefit.

In addition, there is ample case law cited – and I would ask to adopt our earlier leadings and motions – that [17] allow for the raising of an affirmative defense either at motion for summary judgment or on the court's own motion, and it was very clear that there was this issue of whether or not something is sue sponte versus on the court's own motion, and it can be raised on the court's own motion. So the plaintiff in this case, Mr. Blake, was always in jeopardy from the day he filed his complaint until the court ruled on exhaustion that that issue would in fact be raised either through the defendant or through the court itself.

The court should not have to put the time and effort and resources into a trial nor the defendant stand for a trial in the event of a case that should not go forward, and a failure to exhaust is required of the plaintiff in these cases.

In addition, what it talks about is is there an unfair prejudice or are there extraordinary circumstances outside of the defendant's external control, external to the defendant, outside of his control that would allow equitable tolling. It was always in this defendant's control to choose to go forward on an exhaustion remedy and to exhaust that claim at any time prior to filing suit and any time prior to the statute of limitations. To now allow the case to be equitably tolled by the inaction of the plaintiff leads defendants and correctional officers at the whim of every inmate to choose not to exhaust and hope that the court will excuse their own inaction and neglect. There is nothing in this case whatsoever that [18] indicates that the prison officials or the defendant Ross in any way thwarted or attempted to keep Mr. Blake, the plaintiff, from pursuing his remedy, his exhaustion, his remedy through the prison system in this matter. It was simply his choice not to go forward.

So, looking at the failure to exhaust issue, first I would like to provide to the court Defendant's Exhibit No. 1. It's previously been provided to counsel in this matter.

THE COURT: All right.

MS. MELOY: If I may approach.

THE COURT: Give it to the clerk. Yes, that will be fine.

MS. MELOY: One of the issues raised in counsel's motion for reconsideration is that the court relied on the 2008 DCDs and that they were not in effect at the time that this incident occurred. This was clearly – the DCDs that were provided in the motion for summary judgment were known to plaintiff and that was not raised in their opposition. It was not raised until the court granted the motion for summary judgment and in a footnote, page, I believe, 6 of their motion for reconsideration. But the February 15, 2005, DCD that is an established policy of their operation, management and administrative remedy procedures at – and the one that was in effect at the time of this incident of June 21, 2007, specifically says at number R, "If an inmate initially submits a [19] complaint that is subject to this procedure to the Inmate Grievance Office, that office may either require the inmate to exhaust the Administrative Remedy Procedure or accept the grievance," clear, straightforward language that the IGO had the ability to hear this case and the plaintiff made no effort to go forward.

Also, the IGO, in fact, can hear use of force cases directly. Also, counsel in his motion admits and has already conceded to this court that the 1993 directives that were in place at the time as well as the 2005 directive that has been provided to the court makes no mention whatsoever of the IIU process.

The 2008 DCDs, which were not in effect at the time, have a specific ability to have an Administrative Remedy Procedure. There's what's called an ARP,

A-R-P, Administrative Remedy Procedure, and the IGO, the Inmate Grievance Office. They are both available remedies for a – procedures and processes for an inmate to bring a complaint against a DOC employee or a Patuxent employee to the prison's attention, to management.

So, in 2007 when he was required to begin his procedure for bringing this to the attention either of IGO or the attention through an ARP, there was no prohibition listed that indicated that the inmate would be unable to pursue that when an IIU investigation was pending. That was actually added on [20] August 8th of 2008. So, there's really before the court, as Ms. Rice had argued in her motion for summary judgment, two bases on June 21st of 2007 to exhaust, to bring to the prison's attention your complaint and for exhaustion, one being the three-step process of filing an ARP, having it reviewed by the warden, by the commissioner, and then the IGO on appeal, or directly to the IGO as a case of first impression.

The inmate in this case did none of that. As the court in its own opinion cited in our response has found, the mere existence of an internal affairs investigation does not relieve the plaintiff in any way of his duty and obligation to file that administrative remedy. An internal investigation is really a personnel action, a potential review by the prison to determine whether or not personnel matters have been violated and to manage the prison. The grievance process is an opportunity for the inmate himself to bring a matter forward to the prison.

This concept that IGO is not part of a remedy or a complaint process or grievance process for the plaintiff is just to try to obscure the court from the issue. The federal courts have said that we look to the prison system, to the state, to determine how individuals are to seek remedies, and in the state of Maryland we have given two manners in which that can happen. The Inmate Grievance Office is a part of the Department of Public Safety and Correctional Services as well as the Department of Corrections being under the Department of Public [21] Service and Correctional Services. Within the larger umbrella of the state having within its correctional system an opportunity for inmates to be heard, we have both available to them and they must avail themselves of that remedy. So, ultimately for someone to be able to grieve a case, they ultimately have to end up at the Inmate Grievance Office either as a direct case or through the ARP process as the third step.

In addition, the inmates have available to them – and I'm sorry. I need to have this marked as the second exhibit. This is Administrative Remedy Procedure 185-201 and in it it establishes the procedure for inmate awareness of access to the Administrative Procedure Remedy and it tells the inmates if they have any questions regarding the instructions or time frames of the Administrative Remedy Procedure, they should review the Division of Corrections directives or contact the institutional administrative remedy coordinator, and those directives are available in the prison library.

THE COURT: All right. I'll take that. Its Defense 2?

MS. MELOY: Exhibit 2 for defendant Ross.

THE COURT: All right.

MS. MELOY: Therefore, the inmate handbook is not the sole means of information for the plaintiff Blake in this case as well as the COMAR regulations and the Correctional Services article, and the statutory references are also available in the [22] library. The inmate cannot simply feign ignorance or lack of due diligence in pursuing his rights.

Therefore, the court's opinion, whether you do it under the 2005 and 1993 directives or the 2008 directives, has the appropriate outcome, which is that the plaintiff in this case failed to exhaust and, in fact, the 2005 one is even a stronger statement for this court that the inmate clearly knew and had available to him the remedy of the IGO.

In regards to the request to stay, in the case of Boeing v. Horning, which is cited in our response, the court does not have the authority to stay this matter in a PLRA case. The court must dismiss. Plaintiff has not cited one case to the court in its memorandum that is controlling on this court that is a PLRA case that allows the case to be stayed.

So, that leaves us to address with the court the further issue of equitable tolling. The Fourth Circuit has not pronounced its opinion in this matter. I have not found a controlling case. Counsel for Blake has

not cited to the court and also has indicated in its motion that the Fourth Circuit has not yet spoken on this matter.

If the court takes the position that equitable tolling is available in PLRA cases, then the court needs to look at the circumstances and when it should be used. It is the rare circumstance in which it should be used. Equitable tolling generally requires that there be an extraordinary circumstance [23] that prevented the filing and that extraordinary circumstance – rare – is something that is external and beyond the control of the plaintiff and that the plaintiff must have pursued his rights diligently.

In this case the plaintiff failed to act and the only reason he gave for failing to act is that there was an IIU investigation. Clearly he had the ability to go forward with this case and no one from the prison in any way indicated to him – there's no evidence that they thwarted that. He never filed anything. He never received a document back that said "IIU investigation. Case dismissed procedurally." And certainly what we've shown the court now is that in 2007 there were no directives that spoke to that issue. It was only a directive in August of 2008 in terms of the ARP three-step process that speaks to that, and still today under the IGO process a direct complaint could go forward on use of force without an IIU investigation prohibiting it by directive or statute.

So, it would be – there may be prejudice to the plaintiff in that the statute of limitations has run, but

the court has to find its unfair and that its not as a result of the plaintiff's actions, that it was external to him, and the defendants in no way caused that to occur, and to allow him now after the statute of limitations has run – and if you look at the cases that were cited by counsel in their brief, they [24] basically dealt with where equitable tolling was allowed and there were circumstances in which the plaintiff in some way had been delayed from being able to complete his grievance by some act of the prison. There was the Rivera case, Johnson v. Rivera, where the allegation was that the prison guard tore up and threw away the grievance – that's not the case here – that they had, in fact, started the process of the grievance prior to the tolling of the statute of limitations but had not completed it and then the court at that point equitably tolled until the completion of that process.

Therefore, the court should not allow equitable tolling in this case or basically the court has opened the floodgates for every inmate housed in the state of Maryland to come forward to this court and not exhaust and then once the issue is before the court, which was always a viable issue before this court not only through an affirmative defense raised by the plaintiff but through the court's own motion, that they could then go back and say, well, I want to exhaust, and leaving the defendants at a disadvantage as well.

The last issue I would like to discuss with the court is the issue of whether or not exhaustion is

available to Madigan, and I'm not asserting this as a defense on behalf of Mr. Madigan, I do not represent him. Counsel is here. But there was what I saw as a broader policy issue for the Office of Attorney General in representing correctional officers in this [25] matter, which is there is absolutely no authority cited by counsel that says that once someone resigns after 30 years of service with the state of Maryland, retires, goes out on disability retirement because they're injured within the prison setting or is terminated that the failure to exhaust defense would no longer exist for that individual.

The cases that they cited that dealt with when you look at the time of filing as to whether someone is a prisoner or not and has to exhaust deal with the prisoner status. They do not deal with the status of whether or not within the procedural remedies and complaints process that it has to have been a Department of Corrections official or Patuxent official or employee that they're alleging caused some complaint or harm. And so, for the broader policy issue, we wanted to address that with the court, that that is not a correct statement of the law and unsupported by any citation.

Thank you, Your Honor.

THE COURT: All right. Let's hear from Mr. Sachse.

MR. SACHSE: Your Honor, Douglas Sachse on behalf of defendant Madigan.

Your Honor, I'll be very brief. I know you pr ba-bly have noted in this file that we did not file certain responses to the motion for reconsideration. We did not file a motion for summary judgment.

I am here to argue briefly – well, first of all, to [26] say that defendant Madigan would adopt the arguments made by Ms. Meloy and the Attorney General's office with regard to exhaustion and the fact that defendant Madigan subsequently as part of an agreement resigned as a lieutenant for the state.

The only other thing that I wanted to bring forward to Your Honor is that the question of – there's no question but that the PLRA requires exhaustion. I think everybody agrees to that. And I think its become very clear that plaintiff Blake failed to meet that. He did not exhaust his administrative remedies. His failure to do so then raised the issue that because of the PLRA and its requirement, can the court do anything about that, and in this case the court did on its own dismiss the complaint as to Madigan. That is acceptable. That is permissible. But the plaintiff has to have an opportunity to argue that before its dismissed as to defendant Madigan. I would submit, Your Honor, that –

THE COURT: And plaintiff didn't get an opportunity, did he?

MR. SACHSE: Well, that's where I'm going. I understand what Your Honor is saying. But if you go back through the record in this case, you'll see that in the various motions to strike the affirmative defense

raised by defendant Ross as to exhaustion of administrative remedies, the issue was attacked and addressed on several occasions, including in the motion for summary judgment and the reconsideration of the [27] motion for summary judgment and today as to whether or not that applies to this case, and if it does apply to this case, it applies to Madigan, but if it applies to Madigan, which it would, then he, too, should be dismissed. Again –

THE COURT: Isn't that defense waivable, exhaustion?

MR. SACHSE: I think that in my reading of the cases – I will say this, that that defense is possibly waivable by the time you go to trial, yes. But in this case it was fully argued and the court still has the right on its own to dismiss if there was a failure to exhaust as long as the plaintiff has been given an opportunity to make arguments against that.

This issue, as the court I'm sure is aware now through the pleadings and what has been argued here today, has addressed this issue fairly carefully and the plaintiff has had every opportunity to attack and to question whether the plaintiff did, in fact, exhaust administrative remedies.

So, I think it was appropriate for the court to do what it did. The court had the authority to dismiss with regard to Madigan and I would ask the court to uphold that dismissal with regard to defendant Madigan as well as defendant Ross, Your Honor.

THE COURT: All right.

MR. SACHSE: Thank you.

THE COURT: Mr. Claffee, you have the last word. Its your motion.

[28] MR. CLAFFEE: Very briefly, Your Honor. I'll start briefly with the issue with respect to defendant Madigan. Plaintiff Blake did not have an opportunity to address the defense of failure to exhaust with respect to defendant Madigan and, frankly, that should end the issue. The fact that exhaustion has been briefed with respect to defendant Ross should not apply equally to Madigan because the arguments, frankly, would be different. A lot of the argument and discussion with respect to defendant Ross and whether or not the defense should be stricken revolves around the procedural issues of amended complaints and amended answers and waiver and all of this. Defendant Madigan never raised it, not in any responsive pleading, not in a response to the amended complaint, not even in a motion for summary judgment. Until today I had no notice that defendant Madigan even anticipated raising failure to exhaust.

So, I would argue that in terms of the waiver issue, our arguments would be even stronger with respect to defendant Madigan if, in fact, we were to address those arguments. And, of course, the prejudice involved in the fact that it would dispose of the entire case without an opportunity for Blake to refile are equally applicable to defendant Madigan as they are to defendant Ross.

But speaking to defendant Ross's arguments with respect to the amended complaint and amended answer, I believe counsel [29] referred to it as sort of a quid pro quo. I am sympathetic to counsel's statements to the effect that she is new to this case and former counsel, Ms. Rice, was also new to this case and discovered this exhaustion argument. They still haven't explained why this exhaustion argument wasn't obvious on the face of the complaint from the beginning and wasn't raised at the beginning.

I would also like to point out that our desire to get consent to file an amended complaint was because we took over for a pro se litigant who had filed a handwritten complaint that needed necessarily some cleaning up to conform with some of the claims that were obvious on the face of the complaint, but now that appointed counsel was involved in the case, we were able to sort of make that more clear.

I should also add that we – meaning Mayer Brown – were not involved in the case until after the expiration of the statute of limitations. So, even had we recognized, as counsel suggests, that exhaustion was going to be an issue when we got involved, we still would be in the same situation that were in now with respect to the fact that were the case to be dismissed, we wouldn't be able to refile because of the statute of limitations.

THE COURT: Ms. Meloy mentioned that she doesn't think there's any authority to stay.

MR. CLAFFEE: Well, Your Honor, we did cite a case from [30] the Fourth Circuit that is after the amendments to the PLRA. It is not a PERA case. So, defendant Ross may have a good point in that a stay is not available, but we do submit that although the Fourth Circuit has not addressed equitable tolling, that is an avenue available to Your Honor. Its within the court's discretion to order this case – that the statute be equitably tolled while dismissing the case without prejudice for Blake to be able to go and exhaust the IGO process, and although there's no Fourth Circuit authority on that, we do cite from a case called Clifford in the Fifth Circuit, and in a footnote to our motion for reconsideration, page 23 in footnote 15, there are some other cases from other circuits and courts that have held that it is appropriate in light of the fact that this would dispose of all avenues for relief to a prisoner in a 1983 case were the statute to be applied without any sort of tolling.

THE COURT: All right.

MR. CLAFFEE: Thank you, Your Honor.

THE COURT: All right. I tell you what I'm going to do. I'm going to think about this a little more. I've got to probably clean up my opinion certainly in a footnote that you let us know that the 2008 regulation clearly was not applicable at the time of the 2007 acts. I've got to address that. And, quite candidly, Mr. Sachse, I don't see how I'm going to not decide to reinstate the case as to your client. I think everyone agrees here that plaintiff did not get notice, and even

[31] if I were to sua sponte make a decision on exhaustion as a defense, quite candidly – and I'll review the record again – but I don't think there's been any indication by you or your client that you were going to rely on that as a defense. I think its waived. I really do.

MR. SACHSE: Your Honor, I was just going to say you wouldn't even have to review the record.

THE COURT: What's that?

MR. SACHSE: You wouldn't even have to review the record. We did –

THE COURT: Its just not in there? Okay. Its not there. So, as I said, I'm going to again rewrite the opinion, but I'm pretty sure that I'm going to – at least at this juncture I'm pretty sure I'm going to reinstate the case certainly as to your client.

I must admit I did not really think about the lack or the failure to give proper notice or the need to give proper notice to the plaintiff. It just didn't cross my mind at the time, and that's a violation that's been brought to the attention of Mr. Claffee. So, we can't rectify that, and even though in general my thinking at the time was that the failure to exhaust certainly is something viable with Ms. Meloy's client, again, it wasn't raised by you, has not been raised, still has not been raised, and after so many years and months of this case, I just don't think it's something that has not been [32] waived. So, I just wanted to let you know

that's probably the direction that I'm going there for Mr. Sachse's client.

I have to think about the other issues here that Mr. Claffee and Ms. Meloy have raised. They're good arguments. I'll think about it again. I'm not going to spend a whole lot of time keeping the case. I'm going to make a decision quickly, particularly since the administrative process is kind of waiting for a decision here. I think its probably going to come down to whether I think there's any equitable tolling here. So I'll have to look at that issue again.

I still have a view, Mr. Claffee – I'll tell you that now. I'm going to listen to your arguments again. I took good notes. But I still have a view that whether you were looking at the handbook or whether you're looking at the 2005 regulation, I just think there's an obligation on his part to exhaust. But, as I said, you've made some decent arguments. I'll take a look at it. And I don't see any reason for me at this point to not have allowed the amended defense here. I made a decision then. I thought it was fair then and I've looked at all the considerations and I also already addressed the motion to strike. So, I'm not sure you've made a decent case at this time for me to go back on those. But I will take a look at the exhaustion issue here. And I agree with Ms. Meloy here. I don't think there's any real authority for me to be staying cases and so forth.

[33] So, these are just some comments that I've made. It's not written in stone. I'm going to rewrite

my opinion as soon as I can and I'll issue something there. Okay.

MR. CLAFFEE: Thank you.

THE COURT: All right. Thank you.

MS. MELOY: Thank you, Your Honor. Always a please.

THE COURT: Yes, Ms. Meloy.

MS. MELOY: So nice to be back in front of you.

MR. SACHSE: Thank you, Your Honor.

(Proceedings adjourned at 4:55 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

SHAIDON BLAKE,	*	
Plaintiff,	*	
vs.	*	Case No.
GARY MAYNARD, et al.,	*	09-cv-2367-AW
Defendants.	*	

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MEMORANDUM OPINION

(Filed July 11, 2013)

Plaintiff Shaidon Blake filed suit against Defendant James Madigan and a host of others alleging the excessive use of force after Plaintiff was punched multiple times by Madigan. The suit was brought under 42 U.S.C. § 1983. At trial, the jury found Madigan liable and ordered that Madigan pay Plaintiff $50,000 in compensatory damages. There are currently two pending motions: Plaintiff's Motion for Attorney Fees, Doc. No. 138, and Madigan's Motion for New Trial or, in the Alternative, Motion to Alter or Amend the Judgment. Doc. No. 139. For the following reasons, the Court will **GRANT** Plaintiff's Motion for Attorney Fees and **DENY** Madigan's Motion for New Trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Shaidon Blake is an inmate in the Maryland Department of Corrections. Blake accused James Madigan, a correctional officer, of punching him in the face several times with a "fist clenched over a key ring." Blake pursued a 42 U.S.C. § 1983 claim against Madigan, and the case proceeded to trial. At trial, while Blake did not call a medical expert, Blake himself testified of the significant pain and suffering that he incurred as a result of Defendant's actions. He also offered several medical records. After hearing this evidence, the jury found Madigan liable on Blake's § 1983 claim, and awarded Blake $50,000 in compensatory damages.

The Parties have filed two post-verdict motions. The Plaintiff filed a Motion for Attorney Fees, Doc. No. 138, while the Defendant has filed a Motion for New Trial or, in the Alternative, Motion to Alter or Amend the Judgment, Doc. No. 139.

II. ANALYSIS

A. Plaintiff's Motion for Attorney Fees

Under 42 U.S.C. § 1988(b), a prevailing plaintiff in a § 1983 suit may receive "a reasonable attorney's fee." "A court's award of reasonable attorneys' fees is the product of the reasonable hours expended multiplied by a reasonable hourly rate." *Sutton v. Smith*, No. Civ.A. AW-98-2111, 2001 WL 743201, at *1 (D. Md. June 26, 2001). This Court has considered twelve

factors in determining the reasonableness of this product:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Id.

The Prison Litigation Reform Act of 1995 (PLRA) places limitations on the attorney fees that can be awarded in cases brought by prisoners. The PLRA stipulates that the fee must have been "directly and reasonably incurred in proving an actual violation of the plaintiff's rights," and that "the amount of the fee is proportionately related to the court ordered relief for the violation." 42 U.S.C. § 1997e(d). Section 1997e further provides that an award of attorney fees may not exceed 150% of the judgment. 42 U.S.C. § 1997e(d)(2). Additionally, a calculation of attorney fees may not "be based on an hourly rate greater than

150 percent of the hourly rate established under 3006A of Title 18 for payment of court-appointed counsel." 42 U.S.C. § 1997e(d)(3). The current rate of compensation in the District of Maryland is $125 per hour. *See* CJA Hourly Rates, http://www.mdd.uscourts.gov/publications/forms/CJARates.pdf.

Plaintiff submits evidence that Mayer Brown attorneys worked 2,187 hours on this case at varying rates, all of which exceed the statutory maximum of $187.50 per hour. Doc. No. 138-2. In accruing these hours, Plaintiff argues that his counsel had to review years of medical evidence, take a number of depositions, consult a medical expert, and prepare for and conduct trial. Doc. No. 138-1, at 3. Multiplying the number of hours worked by the statutory maximum, Plaintiff submits that his attorneys would be entitled to $410,062.50 in fees were it not for the statutory cap on attorney fees at 150% of the judgment. Consequently, Plaintiff asks for the full $75,000, which is 150% of Plaintiff's $50,000 judgment. Noting the substantial amount of work performed by Plaintiff's counsel, the Court grants Plaintiff the statutory maximum of $75,000 in attorney fees.

The PLRA also provides that a Court must order that a portion of the attorney fees come out of the plaintiff's judgment. 42 U.S.C. § 1997e(d)(2). This portion may not exceed 25% of the judgment. *Id.* The Court may exercise discretion in determining the amount of the judgment that gets directed toward attorney fees. *See Sutton*, 2001 WL 743201, at *2. In the past, when the conduct of the officer has been

egregious, this Court has directed $1.00 of the judgment toward attorney fees and has required the defendant to pay the remainder. *See id.*

Because of the egregious conduct of the Defendant, the Court orders that $1.00 of Plaintiff's attorney fees be taken from Plaintiff's judgment. At trial, the jury found that Defendant "maliciously and sadistically" violated Plaintiff's constitutional rights by punching him several times in the face and throwing him to the ground, causing his head to hit the concrete floor with substantial force. Such egregious behavior requires that only a nominal amount of Plaintiff's judgment be used to pay his attorney fees. *See Sutton*, 2001 WL 743201, at *2. Hence, the Court orders attorney fees to be paid to Plaintiff's counsel in the amount of $75,000, with $1.00 to be paid from Plaintiff's judgment, and the remainder to be paid by Defendant.

Defendant has a number of objections, all of which are meritless. First, Defendant contends that he is destitute and therefore cannot afford to pay Plaintiff's attorney fees. However, he cites no legal authority that uses the means of the defendant as a measuring stick for awarding attorney fees. Wealth, or lack thereof, of the defendant is not listed as one of the twelve factors used to determine a reasonable attorney fee. *See id.* at *1. Moreover, "plaintiffs in civil rights actions shall ordinarily receive fees and costs as long as no special circumstances render such an award unjust. The district court has limited discretion in not awarding fees to a prevailing party."

Clark v. Sims, 894 F. Supp. 868, 870 (D. Md. 1995) (citations omitted). Defendant has asserted no special circumstance compelling the Court to exercise its limited discretion. For this same reason, we also find no merit in Defendant's argument that his counsel spent less time and fewer resources preparing for trial. That his counsel was unwilling or unable to do as much as Plaintiff's counsel does not create a special circumstance rendering it unjust to award attorney fees to Plaintiff.

Third, Defendant argues that most of the time used by Plaintiff's attorneys was spent dealing with claims against defendants other than Madigan. However, by the time Mayer Brown was appointed, all defendants other than Madigan and Michael Ross had been dismissed from the case. Doc. Nos. 3, 33, 38. Plaintiff points out that much of Mayer Brown's work was related to factual discovery, and the factual discovery performed to pursue the case against Madigan is largely indistinguishable from the factual discovery taken to pursue the case against Ross. Moreover, because Ross was dismissed from the case prior to trial, all of Mayer Brown's trial preparation was focused solely on the case against Madigan. However, as the Fourth Circuit has explained,

> It is often quite difficult to separate the hours worked "on a claim-by-claim basis" when "plaintiff's claims for relief involve a common core of facts or [are] based on related legal theories." When this is the case, the chief consideration becomes "the

> significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." When the results have been "excellent," the award should encompass "all hours reasonably expended on the litigation."

Knussman v. Maryland, 73 F. App'x 608, 614 (4th Cir. 2003) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983)). There is no dispute that Plaintiff received excellent results, and Defendant has put forward no evidence or argument that Plaintiff's counsel acted unreasonably. Hence, the Court declines to lower its award of attorney fees to Plaintiff.

Fourth, Defendant asserts that Madigan's cooperation made it easy for Plaintiff to prevail and helped the trial run smoothly. That the costs of the litigation would have been even higher had Defendant not cooperated does not give the Court a reason to deny Plaintiff attorney fees for the costs that were actually incurred. Moreover, even if the Court accepted Defendant's arguments as factually true, they would not justify a reduction in the attorney fees owed to Plaintiff. Plaintiff's attorney fees, using the maximum statutory rate, were over $400,000; Plaintiff is seeking to recover only a fraction of that amount. Even accounting for Defendant's financial circumstances and cooperation, and the possibility that time was spent pursuing litigation against other defendants, the Court would not reduce Plaintiff's attorney fees below the $75,000 threshold.

2. Defendant's Motion for New Trial or, in the Alternative, Motion to Alter or Amend the Judgment

Defendant has filed a motion asking the Court to amend the judgment and impose a verdict of nominal damages to the Plaintiff or, in the alternative, to grant a new trial. Doc. No. 139. The motion focuses entirely on the fact that the Plaintiff did not call a medical expert to demonstrate that the Defendant's conduct caused Plaintiff's injury. For the sake of clarity and exhaustion, the Court will presume that Defendant is moving both for a new trial under Rule 59 and, in the alternative, for a judgment as a matter of law pursuant to Rule 50.

Defendant's motion fails on the merits.[1] Under Rule 50, the Court must enter judgment for Defendant if "a reasonable jury would not have a legally sufficient evidentiary basis to find for" Plaintiff Fed. R. Civ. P. 50(a)(1). "In ruling on a motion for judgment as a matter of law, the trial court should consider the record as a whole viewing the evidence presented in the light most favorable to the party against whom the motion is made." *Bostron v. Apfel*, 104 F. Supp. 2d 548, 551 (D. Md. 2000). "The court must draw all reasonable inferences in the nonmovant's favor without

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[1] Plaintiff argues that Defendant did not properly preserve this motion. The Court, absent a full trial transcript, is not in a position to evaluate this argument. Nonetheless, the Court need not evaluate Defendant's preservation of the motion as the motion fails on the merits.

weighing the evidence or assessing the witness' credibility." *Pathways Psychosocial v. Town of Leonardtown, Md*, 223 F. Supp. 2d 699, 706 (D. Md. 2002).

On the other hand, under Rule 59,

> a district court must[ ] set aside the verdict and grant a new trial if (1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.

Id. In applying this standard, "[c]ourts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *Id.* (alteration in original) (internal quotation marks omitted). "In general reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citation and internal quotation marks omitted).

The Defendant's Motion fails under both Rule 50's "legally sufficient evidentiary basis" standard and Rule 59's "clear weight of the evidence" standard. The jury had more than sufficient evidence to conclude that Plaintiff was entitled to $50,000 in damages. "Compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation

personal humiliation, and mental anguish and suffering." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (citation and internal quotation marks omitted). Here, Plaintiff provided testimony of his suffering, explaining that his "face was swollen up from being hit with a metal key chain like with the effect of brass knuckles." Doc. No. 142, at 74:6-10. He also explained that he suffered from headaches after the beating. *Id.* Further, Plaintiff testified that he was constantly in pain for two weeks after the incident and that he still has headaches and pain to this day. *Id.* at 78:8-11, 81:3-6. Moreover, he explained that he has complained of headaches at every correctional facility he has been to, and that he was prescribed Neurontin to counteract the headaches. *Id.* at 131:25-135:22. While he had been prescribed Neurontin before, he testified that he was prescribed much higher doses after Madigan's attack. *Id.* Plaintiff testified that he is currently taking the highest dosage of Neurontin that he has ever received. *Id.* Finally, Plaintiff submitted several exhibits of medical records detailing the pain he experienced after Madigan's attack. *See* Doc. No. 128, Plaintiff's Exhibit List.

Defendant argues that this evidence is insufficient as a matter of law because Plaintiff did not call a medical expert to explain that his injuries were linked to Defendant's actions. However, no such expert was required:

> There are many occasions where the causal connection between a defendant's negligence

> and a disability claimed by a plaintiff does not need to be established by expert testimony. This is particularly true when the disability develops coincidentally with, or within a reasonable time after, the negligent act, or where the causal connection is clearly apparent from the illness itself and the circumstances surrounding it, or where the cause of the injury relates to matters of common experience, knowledge or observation.

Osunde v. Lewis, 281 F.R.D. 250, 261 (D. Md. 2012) (citations and quotation marks omitted). Here, Plaintiff's testimony indicates that he suffered from pain and headaches after he was repeatedly struck on the head by Defendant. It is plain to this Court that the "causal connection is clearly apparent" from Plaintiff's injury. Moreover, suffering from significant pain and headaches after being repeatedly struck in the head is so obvious that it can be considered a matter of common experience, knowledge, or observation. Hence, no medical testimony was necessary to establish the causal link between Defendant's acts and Plaintiff's injury.

The lack of medical testimony offered by Plaintiff is the sole basis for Defendant's motion. Because this argument is meritless, the Court will deny Defendant's motion. The Court is satisfied that Plaintiff's testimony and medical records demonstrate that the verdict was not against the weight of the evidence under Rule 59, and that they provided a legally sufficient basis for the verdict under Rule 50.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Attorney Fees will be GRANTED, and Defendant's Motion for New Trial or, in the Alternative, Motion to Alter or Amend the Judgment will be DENIED. A separate Order follows.

July 10, 2013
Date

/s/
Alexander Williams, Jr.
United States District Judge

[United States Court of Appeals for the Fourth Circuit, Excerpts of Joint Appendix, filed March 14, 2014]

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
DIVISION OF CORRECTION

[SEAL] **DIVISION OF CORRECTION DIRECTIVE**	**PROGRAM: ADMINISTRATIVE REMEDY PROCEDURE**
	DCD #: 185-002
	TITLE: Administrative Remedy Procedure Policy
	ISSUED: February 15, 2005
	AUTHORITY: /s/ Patricia Allen ASSISTANT COMMISSIONER
	APPROVED: /s/ F C. Sizer, Jr. COMMISSIONER

I. REFERENCES:
A. DCDs 175-2, 185-101, 185-204, 185-402
B. MCCS Standard .05 I.
C. ACA Standard 4-4284

II. APPLICABLE TO: All Division of Correction inmates housed in Division of Correction Facilities

III. PURPOSE: To establish policy for the operation and management of the Administrative Remedy Procedure.

IV. POLICY:

A. Staff and inmates of the Division of Correction are encouraged to make a good faith

effort to resolve all institutionally related inmate complaints at the lowest possible level. Inmates are encouraged, but not required, to seek resolution of complaints through the informal resolution process.

B. Inmates may seek formal resolution through the Administrative Remedy Procedure.

C. Inmates may seek relief through the Administrative Remedy Procedure for issues that include but are not limited to:

1. Institutional policies and procedures;
2. Medical services;
3. Access to courts;
4. Religious liberties;
5. Lost, damaged, stolen, destroyed, or improperly confiscated property;
6. Use of force;
7 Rejection of unopened inmate to inmate correspondence;
8. Institutional conditions affecting health, safety, and welfare; and
9. Administration and operation of the Administrative Remedy Procedure.

D. Inmates may not seek relief through the Administrative Remedy Procedure on the following issues:

1. Classification recommendations and decisions;
2. Maryland Parole Commission procedures and decisions;
3. Disciplinary hearing procedures and decisions; and
4. Appeals of decisions to withhold mail.

E. Inmates may submit a request for Administrative Remedy concerning the rejection of any **unopened** inmate to inmate correspondence. However, any inmate-to-inmate correspondence that is returned to an inmate **opened**, the inmate must follow the established policy and procedures regarding the withholding of mail

F. Every inmate, regardless of physical condition, security level, administrative status, language barrier, or housing is entitled to submit a complaint for resolution through the Administrative Remedy Procedure on those issues which qualify.

G. If an inmate has reason to believe that there would be an adverse effect if the complaint became known at the institution, the request may be addressed directly to the Commissioner. When a request is submitted directly to the Commissioner, the inmate shall provide a written explanation for not submitting the request to the warden.

H. The Division of Correction does not approve and will not allow formal or informal disciplinary actions to be sanctioned against inmates who use the Administrative Remedy Procedure in good faith.

I. Inmates may use the Administrative Remedy Procedure to pursue complaints of formal or informal reprisals against them. When such complaints are found to have merit, the warden shall take appropriate disciplinary

action in accordance with Division of Correction directives and personnel guidelines.

J. Inmates are restricted from filing complaints on behalf of other inmates or from filing class action complaints. However, a member of the executive body of a recognized inmate organization may submit a complaint on behalf of the organization concerning a rule or other issue that affects the entire organization.

K. The transfer of an inmate to another institution does not terminate the administrative remedy process.

L. If an inmate submits a Request for Administrative Remedy or Headquarters Appeal of Administrative Remedy Response and is released prior to the issuance of the response, the case shall be dismissed as moot, with the exception of cases concerning monetary complaints, property complaints, and complaints concerning sentence computation and diminution of confinement.

M. Inmates may submit any number of requests at one time; however, each complaint shall be submitted on a separate request form and shall be a separate issue.

N. All requests and appeals shall be submitted in the name under which the inmate is committed to the custody of the Commissioner of Correction. An inmate may, however, include a religious name or a name authorized by court order as an AKA.

O. Inmates may use institutional courier mail systems to send requests or appeals. However, the Division of Correction will bear no responsibility for delivery dates exceeding applicable time frames. Unless indigent, as defined by DCD 175-2, inmates are encouraged to affix proper postage and use the U.S. Postal Service when sending requests or appeals outside of the institution.

P. Staff shall process administrative remedy requests and appeals consistent with the time frames established in DCD 185-101.

Q. The Headquarters coordinator shall redirect requests for administrative remedy that are improperly addressed to the Commissioner to the appropriate warden, with the exception of adverse effect requests.

R. If an inmate initially submits a complaint that is subject to this procedure to the Inmate Grievance Office, that office may either require the inmate to exhaust the Administrative Remedy Procedure or accept the grievance. If the Inmate Grievance Office requires the inmate to exhaust the Administrative Remedy Procedure, that office will notify the inmate of this requirement in writing and will send a copy of the notification to the institutional administrative remedy coordinator. Within fifteen days of the date of this notification, the inmate may submit a Request for Administrative Remedy, and the time frame established in DCD 185-101 shall be set aside.

S. If an inmate submits a complaint directly to a state or federal court, the court will be invited to refer the complaint or grievance to the Division of Correction for handling through the Administrative Remedy Procedure. However, this will not apply in cases where the complaint submitted to a state court is a final appeal of an inmate grievance decision. When a federal or state court refers a matter to the Division of Correction for handling under the Administrative Remedy Procedure, the Division of Correction will, upon receipt, refer the matter to the warden for review in accordance with DCD 185-204. The time frame established in DCD 185-101 shall be set aside.

T. Inmates who no longer wish to actively pursue a complaint through the Administrative Remedy Procedure may elect to withdraw their requests in accordance with the procedures established in DCD 185-402.

U. This series of directives establishes policy and procedure for the operation of the Administrative Remedy Procedure throughout the Division of Correction. No institutional/unit directives are required for its implementation.

V. RESCISSION: DCD 185-002, dated April 1, 1993

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STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
DIVISION OF CORRECTION

[SEAL] DIVISION OF CORRECTION DIRECTIVE	**PROGRAM: ADMINISTRATIVE REMEDY PROCEDURE**
	DCD #: 185-003
	TITLE: Definitions
	ISSUED: April 1, 1993
	APPROVED: /s/ [Illegible] COMMISSIONER

I. REFERENCES: DCD 185-100, Administrative Remedy Procedure Description
DCD 185-101, Time Frames

II. PURPOSE: To define terms as used throughout this series of directives as they apply to the Administrative Remedy Procedure.

III. DEFINITIONS:

Administrative Remedy Procedure: a mechanism for the resolution of inmate complaints for inmates housed within Division of Correction facilities.

Administrative dismissal: a disposition of a request or appeal for administrative reasons (such as timeliness, sufficiency of information, completeness, or a determination that the complaint is frivolous or malicious) without consideration of the merit of the complaint.

Administrative remedy coordinator: an employee designated by the commissioner or warden or their designee to receive, acknowledge, and direct the investigation of complaints and to maintain all records relating to the procedure.

Adverse effect request: a request for administrative remedy submitted directly to the commissioner due to the complainant's belief that knowledge of the complaint at the institution would result in irreparable harm to the complainant.

Appeal:

1. to bring from a lower level to a higher level for consideration or judgment;
2. the second step of the formal complaint resolution process or Administrative Remedy Procedure;
3. DC Form 185-100cR, Headquarters Appeal of Administrative Remedy Response, Appendix 4 to DCD 185-100.

Appeal of untimely response: an appeal sent to the commissioner due to the warden's failure to issue a response to a Request of Administrative Remedy within the proper time frame.

ARP: Administrative Remedy Procedure.

Department liaison: an institutional departmental supervisor designated by the warden to serve as an investigator of administrative remedy requests and/or to delegate such investigations to departmental staff.

Dismiss: to find without merit; to deny based on the issues.

Emergency request: an administrative remedy request submitted due to an unforeseen combination of circumstances which may threaten the health, safety, or welfare of an inmate and which calls for immediate action.

Exhaust: to take complete advantage of; to use up completely.

Extension: an increase in the length of response time by agreement.

Formal resolution: to seek a written judgement or decision and relief from the warden or commissioner regarding an institutionally related complaint.

Frivolous: a complaint which is not serious or practical in content or form; a complaint submitted for mere purposes of delay and/or embarrassment.

Informal resolution: to seek a written judgement or decision and relief directly from institutional staff regarding an institutionally related complaint.

Malicious: a complaint characterized by wicked, spiteful, or mischievous intentions or motives; a complaint submitted to accomplish some end which the administrative remedy process was not designed to accomplish and does not arise from a regular use of the process.

Meritorious: relief fully granted; to be found completely in favor of.

Meritorious in part: relief partially granted; to be found in favor of some but not all.

Misdirect: to address incorrectly; to send to the wrong person or place.

Moot: had been resolved or no longer capable of resolution.

Relief: redress; correction of error; compensation; that which is specifically requested as relief.

Reprisal: any action taken by inmate or staff either out of spite or in retaliation for submitting a complaint through the Administrative Remedy Procedure.

Request:

1. the initial step of the formal complaint resolution process;
2. DC Form 185-100b, Request for Administrative Remedy, Appendix 3 185-100.

Time frame: the period of time during which a specific step of the Administrative Remedy Procedure must occur as established in DCD 185-101, Time Frames.

Withdraw: to rescind an administrative remedy request; to arrest or stop the processing of an administrative remedy request prior to response.

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STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
DIVISION OF CORRECTION

[SEAL] DIVISION OF CORRECTION DIRECTIVE	**PROGRAM: ADMINISTRATIVE REMEDY PROCEDURE**
	DCD #: 185-205
	TITLE: Administrative Dismissal of a Request
	ISSUED: April 1, 1993
	APPROVED: /s/ [Illegible] COMMISSIONER

I. REFERENCES: DCD 185-002, Policy
DCD 185-003, Definitions
DCD 185-100, Administrative Remedy Procedure Description
DCD 185-101, Time Frames
DCD 185-600, Documentation and Reporting

II. PURPOSE: To establish the criteria and procedure for the administrative dismissal of a request for administrative remedy.

III. PROCEDURE:

A. Within five working days of the date received, the institutional administrative remedy coordinator shall:

1. assign a case number to the request for administrative remedy in accordance with the procedures in DCD 185-600;

2. index the request in accordance with the procedures in DCD 185-600; and

3. review the request for administrative dismissal or acceptance and investigation.

B. Administrative Dismissal (Pending Resubmission)

1. The institutional coordinator will administratively dismiss the request pending resubmission when the inmate had failed to properly complete all sections of the request for administrative remedy, DC Form 185-100bR.

a. The institutional coordinator will:

1) provide in the receipt portion, Part C, the reason(s) why the request is incomplete;

2) provide specific instructions for the inmate to properly complete the request for administrative remedy and the specific date by which the inmate may submit the request to the warden; and

3) return the request and a blank request for administrative remedy to the inmate.

b. Failure by the inmate to resubmit the request in accordance with the instructions will result in a final administrative dismissal.

2. The institutional coordinator will administratively dismiss a request pending resubmission when the inmate had failed to provide sufficient information or specific information within the complaint essential for the completion of its investigation.

   a. The institutional coordinator will:

      1) provide in the receipt portion, part C, the reason(s) why the request is not sufficient;

      2) provide specific instructions for the inmate to correct the insufficiency and the specific date by which the inmate may resubmit the request to the warden; and

      3) return the request and a blank request for administrative remedy to the inmate.

   b. Failure by the inmate to resubmit the request in accordance with the instructions will result in a final administrative dismissal.

C. Administrative Dismissal (Final)

1. The warden will administratively dismiss a request for administrative remedy when the request had been determined to be frivolous and/or malicious. The warden will:

   a. provide in the response port, Part B., the rationale for dismissal;

b. sign and date Part B; and

c. forward the request to the institutional coordinator to be indexed, copied, and distributed in accordance with Section III.E. of this directive.

2. The institutional coordinator will administratively dismiss a request for administrative remedy received regarding any of the following issues:

a. case management recommendations and decisions;

b. Maryland Parole Commission procedures and decisions;

c. Adjustment hearing procedures and decisions; and

d. Appeals of notices of decision to withhold mail.

3. The institutional coordinator will administratively dismiss a request when the inmate has failed to submit the request within the time frame established in DCD 185-101. The institutional coordinator may, as necessary, refer such cases to appropriate institutional staff for evaluation and follow-up outside of the administrative remedy procedure.

4. The institutional coordinator will administratively dismiss a request for administrative remedy when the inmate had failed to resubmit and insufficient or

incomplete request in accordance with the coordinator's instructions.

4. The institutional coordinator will administratively dismiss a request when the inmate's complaint is:

   a. one which had been previously resolved; or

   b. repetitive or had been previously addressed through the administrative remedy procedure.

D. When a request is administratively dismissed by the coordinator, the coordinator will:

1. provide in the receipt portion, Part C, the rationale for dismissal; and

2. sign and date part C.

E. The coordinator shall return any request which is administratively dismissed to the inmate on the date the request is indexed and reviewed and ensure that the completed request for administrative remedy is distributed as follows:

1. original and two copies to the inmate; and

2. one copy to the administrative remedy file maintained by the coordinator.

F. A final administrative dismissal of a request by the warden or institutional coordinator will be treated as a substantive decision and

the rationale for dismissal may be appealed by the inmate.

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STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
DIVISION OF CORRECTION

[SEAL] **DIVISION OF CORRECTION DIRECTIVE**	**PROGRAM: ADMINISTRATIVE REMEDY PROCEDURE**
	DCD #: 185-205
	TITLE: Administrative Dismissal of a Request
	ISSUED: April 1, 1993
	APPROVED: /s/ [Illegible] **COMMISSIONER**

DCD CHANGE NOTICE 12-98
EFFECTIVE DATE March 6, 1998

CHANGE # 1 TO THIS DCD

1. The following is added as Section III.C.6.:

III.C.6. The institutional coordinator will administrative dismiss any request in excess of the monthly limit not processed as an emergency.

2. Please incorporate this change into all copies of this DCD.

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DIVISION OF CORRECTION

[SEAL] **DIVISION OF CORRECTION DIRECTIVE**	**PROGRAM: ADMINISTRATIVE REMEDY PROCEDURE**
	DCD #: 185-002
	TITLE: Administrative Remedy Policy
	ISSUED: August 4, 2008
	EFFECTIVE: August 27, 2008
	AUTHORITY: /s/ Paul B. O'Flaherty **Paul O'Flaherty** **Assistant Commissioner**
	APPROVED: /s/ J. Michael Stouffer **J. Michael Stouffer** **Commissioner**

I. References:

A. Suits by Prisoners, 42 U.S.C.§ 1997e(a)
B. Correctional Services Article, §§ 10-201 through 10-210, Annotated Code of Maryland
C. Courts and Judicial Proceedings Article, §§ 5-1001 through 5-1007, Annotated Code of Maryland

D. COMAR 12.02.27 and COMAR 12.07.01.
E. DCD 175-2 and 250-1

II. Applicable to: All Division of Correction inmates housed in Division of Correction institutions and facilities

III. Purpose: To establish policy for the operation and management of the Administrative Remedy Procedure (ARP).

IV. Definition: Administrative Remedy Procedure means the procedure established by the Commissioner of Correction for inmate complaint resolution.

V. Policy:

A. The Division of Correction encourages staff and inmates to make a good faith effort to resolve all institutionally related inmate complaints at the lowest possible level. Inmates are encouraged, but not required, to seek resolution of complaints through the informal resolution process. Inmates may seek formal resolution through the Administrative Remedy Procedure.

B. Formal resolution under the Administrative Remedy Procedure consists of two levels:

1. Filing a request for administrative remedy with the Warden, and

2. Appealing to the Commissioner, if not satisfied with the response.

C. An inmate not satisfied with the outcome of the Administrative Remedy Procedure Process may seek further administrative review in accordance with regulations of the Inmate Grievance Office (IGO).

D. The purposes of the Administrative Remedy Procedure are to solve inmate problems and to be responsive to inmate concerns. When the Division of Correction finds that a request for administrative remedy or an appeal is meritorious in whole or in part, the Administrative Remedy Procedure, to the extent possible, should provide the inmate with meaningful relief.

E. It is the policy of the Division of Correction that requests for administrative remedy and appeals under the Administrative Remedy Procedure should be answered on the merits and substantive relief provided to the inmate where warranted. Nevertheless, inmates must adhere to the time periods and other requirements set forth in this Directive and should not expect that any late submission will be considered.

VI. Procedures:

A. Inmates may seek relief through the Administrative Remedy Procedure for issues that include, but are not limited to:

1. Division of Correction and institutional policies and procedures;

2. Medical services;

3. Access to courts;

4. Religious liberties;

5. Lost, damaged, stolen, destroyed, or improperly confiscated property;

6. Use of force;

7 Sentence computation and diminution of confinement;

8. Institutional conditions affecting health, safety, and welfare; and

9. Administration and operation of this procedure.

B. Inmates may not seek relief through the Administrative Remedy Procedure on the following issues:

1. Case management recommendations and decisions;

2. Maryland Parole Commission procedures and decisions;

3. Disciplinary hearing procedures and decisions; and

4. Decisions to withhold mail.

C. Inmates may seek relief concerning case management recommendations and decisions both through informal resolution and under IGO regulations. Disciplinary hearing decisions may be appealed under a wholly separate procedure in accordance with COMAR 12.02.27, applicable DPSCS directives, and

under IGO regulations. Under no circumstances should inmates use the Administrative Remedy Procedure to raise any issue concerning disciplinary hearing procedures and decisions. Decisions to withhold mail may be appealed pursuant to DCD 250-1.

D. Every inmate in the Division of Correction, regardless of physical condition, security level, administrative status, language barrier or housing assignment is entitled to submit a request for administrative remedy on those issues that qualify, and to appeal to the Commissioner if not satisfied with the response. If asked, wardens and staff shall ensure that assistance in filing requests for administrative remedy and appeals under the Administrative Remedy Procedure is available to inmates who are disabled or who are not functionally literate in English. Wardens shall ensure that the proper forms for using the Administrative Remedy Procedure are readily available in all housing units.

E. Inmates are responsible for using the Administrative Remedy Procedure in good faith and in an honest and straightforward manner. When filing a request for administrative remedy or an appeal, inmates should briefly and clearly state the facts giving rise to the complaint and the relief requested.

F. The Division of Correction will not allow any retaliation to be taken against inmates who use the Administrative Remedy Procedure in good faith. Inmates may use the Administrative

Remedy Procedure to pursue complaints of any retaliation against them. When a claim of retaliation is confirmed, the Warden shall take appropriate action in accordance with Department of Public Safety and Correctional Services standards of conduct.

G. Inmates may not file request for administrative remedy or appeals on behalf of other inmates, staff, or other third persons (such as visitors). Inmates are also restricted from filing class action complaints under this Directive.

H. All requests for administrative remedy and appeals to the Commissioner shall be submitted in the name under which the inmate is committed to the custody of the Commissioner of Correction and shall include the inmate's identification number. An innate may also include a religious name or name authorized by court order.

I. The transfer of an inmate does not terminate the administrative remedy process, although transfer of an inmate may be relevant to any relief. An inmate who is transferred after an incident but prior to filing a request for administrative remedy shall submit the request to the Warden of the inmate's current institution, within the appropriate time period.

J. Except as provided in Section VI.K of this Directive, inmates may submit any number of requests for administrative remedy on

issues that qualify under the Administrative Remedy Procedure.

K. The Commissioner of Correction may limit the number of requests an inmate may file if the inmate has misused the Administrative Remedy Procedure by filing requests that are frivolous, unnecessarily duplicative, or which contain threatening, obscene or abusive language or material.

1. The Warden shall make a written recommendation to the Commissioner regarding the number of requests to which the inmate should be limited and the duration of the limitation using the Administrative Remedy Procedure Limitation Request, Appendix 1 to this Directive. The recommendation must provide a compelling reason for the limitation. The Warden's responsibilities under this section may be delegated only to an Assistant Warden.

2. The Commissioner shall review the recommendation to limit an inmate's use of the Administrative Remedy Procedure and respond in writing by approval or disapproval of the recommendation. The Commissioner's responsibilities under this section may only be delegated to an Assistant Commissioner.

3. An inmate may appeal a decision by the Commissioner to limit the number of administrative remedy requests to the IGO. Any appeal must be received by the

IGO within 30 days of the date the inmate receives the Commissioner's decision.

4. The Warden may dismiss any requests for administrative remedy that exceed the limit approved by the Commissioner. Regardless of any dismissal, staff shall investigate and take appropriate action on any issue in a request if failure to do so could result in serious harm.

L. Time Periods and Filing Procedures at the Institutional Level:

1. An inmate may, at any time, attempt informal resolution of a complaint, using both correspondence and discussion with staff, as well as the Informal Inmate Complaint Form, Appendix 2 to this Directive.

2. Inmates are encouraged to use informal resolution, but attempting informal resolution does not suspend or stay the deadline for filing a formal request for administrative remedy or any other time period.

3. An inmate must date, sign, and submit Request for Administrative Remedy, Appendix 3 to this Directive, within the later of:

a. Thirty (30) calendar days of the date on which the incident occurred; or

b. Thirty (30) calendar days of the date the inmate first gained knowledge of the incident or injury giving rise to the complaint.

4. Wardens should recognize that certain complaints may be ongoing in nature and therefore not always subject to a strict application of this time period. For example, the heating system in an inmate's housing unit has been malfunctioning for over 60 days. However, the weather has been unseasonably warm and the inmate has not complained because he or she has not been cold. The weather suddenly changes and now the inmate is cold and consequently complains about the malfunctioning heating system.

5. Requests for administrative remedy concerning sentence computation and diminution of confinement are not subject to the 30-day time period. Although this type of request may be filed at any time, inmates are encouraged to submit a request concerning sentence computation and diminution of confinement as soon as the inmate becomes aware of the problem. Appeals to the Commissioner of Correction concerning sentence computation and diminution of confinement must be filed within the time period set forth in Section VI.M.1 of this Directive.

6. When extraordinary circumstances prevent an inmate from submitting a request for administrative remedy within the 30-day time period, the Warden may accept a late filing.

7. The inmate shall describe a single complaint or a reasonable number of closely related issues on the request form. "Closely related issues" are those that arise out of a single occurrence or condition. For example, an inmate seeking both medical attention and monetary damages due to a claim of excessive force is clearly raising two closely related issues.

8. The inmate shall clearly and briefly state the facts giving rise to the complaint so that the basis for investigation can be determined. The necessary facts include:

   a. The date and location of the occurrence;

   b. The names(s) of staff involved;

   c. The name(s) of any witnesses;

   d. A brief statement of the facts; and,

   e. A brief statement of the relief requested.

9. If the inmate includes more than one issue in a single request for administrative remedy and the issues are not closely related or does not provide sufficient information to determine the basis

for investigation, the Warden may dismiss the request for procedural reasons.

a. If the Warden dismisses a request because the complaint contains multiple unrelated issues or does not provide sufficient information to determine the basis for investigation, the inmate may resubmit a request containing a single issue, or a reasonable number of closely related issues, or may resubmit with additional information needed to determine the basis for investigation.

b. The inmate must resubmit the request within the original time period or within 15 days of the date of dismissal, whichever is later.

c. Regardless of any dismissal, staff shall investigate and take appropriate action on any issue in a request for administrative remedy if failure to do so could result in serious harm.

10. The inmate shall submit the request for administrative remedy to an officer in the control center of the inmate's housing unit, a tier officer, or a custody supervisor. The officer who receives a request for administrative remedy must sign and date the form and provide the inmate with the carbonless copy of the request. The officer who receives a request for administrative remedy must

deliver the request to the location designated by the Warden by the end of that officer's shift.

11. Within five business days of the date the inmate submits a request for administrative remedy, the Warden shall provide the inmate with a receipt and case number. Inmates are responsible for keeping the carbonless copy of the request for administrative remedy and any receipts. These documents are needed in the event of further proceedings.

12. The Warden shall investigate and respond to all requests for administrative remedy within 30 calendar days of the date of submission of the request for administrative remedy.

    a. The Warden is permitted one extension of 15 calendar days to respond to a request for administrative remedy. The inmate's consent to the extension is not required.

    b. If the Warden extends the time to respond, the Warden must provide written notice of the extension using the Extension Form, Appendix 4 to this Directive. The completed form must be sent to the inmate within the original 30 days.

13. An inmate may withdraw a request for administrative remedy at any time. An inmate who withdraws a request for

administrative remedy shall submit the withdrawal using the Withdrawal Form, Appendix 5 to this Directive. Withdrawal of the request may prevent consideration of the claim at a higher level.

14. By separate Directive, the Commissioner shall establish standards for the investigation of requests for administrative remedy and preparing responses, as well as the duties of wardens and institutional administrative remedy coordinators.

15. Regardless of any dismissal for procedural reasons, staff shall investigate and take appropriate action on any issue in a request for administrative remedy if failure to do so could result in serious harm.

16. The Warden shall promptly provide to the inmate any relief ordered in response to a request for administrative remedy or appeal.

17 If the Warden fails to respond to a request for administrative remedy within 30 calendar days of the date the request is submitted or within 45 calendar days of the date the request is submitted, if an extension is required by the Warden under Section VI.L.12.a of this Directive, the request for administrative remedy is considered denied and the inmate may appeal to the Commissioner of Correction.

M. Time Periods and Filing Procedures for Appeals:

1. All appeals to the Commissioner of Correction must be dated, signed and submitted, using the Headquarters Appeal of Administrative Remedy Response, Appendix 6 to this Directive, so that the appeal is received by the Commissioner's Office within 30 calendar days of the date the imitate receives the Warden's response, or within 30 calendar days of the date the response from the Warden was due.

   Appeals concerning sentence computation and diminution of confinement are included within this time period.

2. Unless indigent as defined by DCD 175-2, inmates are encouraged to affix proper postage and use the United States Postal Service when submitting an appeal. Inmates may also use institutional courier mail systems to submit appeals. If an institutional courier system is used, the Division of Correction has no responsibility for delivery dates exceeding the applicable time period.

3. When extraordinary circumstances prevent an inmate from submitting an appeal so that it is received by the Commissioner's Office within the 30-day time period, the Commissioner may accept a late filing.

4. An inmate may appeal to the Commissioner even if the Warden finds the complaint meritorious in whole or in part, for example, if the inmate is dissatisfied with the relief ordered by the Warden.

5. When any appeal is received by the Commissioner, the headquarters administrative remedy coordinator shall, within five business days of the date the appeal was received, send the inmate Part C of the appeal notifying the inmate of the date the appeal was received.

6. The Commissioner shall investigate and respond to all appeals within 30 calendar days of the date the appeal is received, unless an extension is required under Section VI.M.9.b of this Directive.

7 The Commissioner's investigation of an appeal is not limited by any investigation conducted by the Warden. When responding to an appeal, the Commissioner is not limited to affirming or reversing the Warden's decision. The Commissioner may take any action in response to an appeal that is consistent with the major purposes of the Administrative Remedy Procedure.

8. A failure by the Warden to respond to a request for administrative remedy in a timely manner does not prevent the Commissioner from responding to an

appeal on any basis that was available to the Warden.

9. If the inmate appeals to the Commissioner after the Warden has failed to respond in a timely manner, the Commissioner may direct the Warden to investigate the complaint and prepare a recommended response to the appeal for the Commissioner to review.

   a. The Warden shall investigate and prepare a recommended response to the appeal on behalf of the Commissioner and provide the Commissioner with the recommended response within 15 calendar days of the date of the Commissioner's order, or earlier if required by the Commissioner.

   b. If the Warden is directed to investigate and prepare a recommended response on behalf of the Commissioner, the Commissioner is permitted one extension of 15 calendar days to respond to the appeal. The inmate's consent to the extension is not required.

   c. If the Commissioner extends the time to respond to an appeal, the Commissioner must provide written notice to the inmate using the Extension Form, Appendix 4 to this directive within the original 30 days.

d. The Commissioner may accept or reject the Warden's recommended response, substitute the Commissioner's response, or take any action consistent with the purposes of the Administrative Remedy Procedure, except remanding to the Warden for further proceedings at the institutional level.

10. If the inmate appeals to the Commissioner after the Warden has failed to respond in a timely manner, and the inmate subsequently receives a response from the Warden concerning the same request for administrative remedy, the Warden shall also provide the Commissioner with a copy of the untimely response.

    a. The inmate may withdraw the appeal using the Withdrawal Form, Appendix 5 to this Directive if the inmate is satisfied with the Warden's response, even though the response was not timely.

    b. If the inmate is not satisfied with the Warden's response, the inmate may continue with the appeal.

    c. If the inmate continues with the appeal, no further action is required by the inmate. The inmate may but is not required to supplement the appeal based on the Warden's response.

11. Any request for administrative remedy submitted directly to the Commissioner without first being submitted to the Warden shall be referred by the Commissioner to the Warden.

    a. The Commissioner shall refer a request for administrative remedy submitted directly to the Commissioner within 30 calendar days of the date the request is received by the Commissioner. The referral shall include the date the request was received.

    b. The Commissioner shall provide written notice of the referral to the inmate within 30 calendar days of the date the request was received by the Commissioner. The inmate's consent to the referral is not required.

    c. In the event of such a referral, the Warden shall provide the inmate with a receipt using Part C of the request within five business days of receiving the referral and shall respond to the inmate within 30 calendar days of the date the Warden receives the referral.

    d. If an extension of 15 calendar days to respond to a referral is required, the Warden shall provide the inmate with written notice within 30 calendar days of the date the Warden

received the referral using the Extension Form, Appendix 4 to this Directive. The inmate's consent to the extension is not required.

e. In all respects, the referral shall he treated as if it were an original request for administrative remedy, except that no referral by the Commissioner shall be dismissed by the Warden for lack of timeliness if the original request was received by the Commissioner within 30 calendar days of the date of the incident or within 30 calendar days of the date the inmate gained knowledge of the incident or injury giving rise to the complaint, whichever is later.

f. Regardless of any referral, headquarters staff shall investigate and take appropriate action on any issue in a request for administrative remedy submitted directly to the Commissioner if failure to do so could result in serious harm.

12. By separate Directive, the Commissioner shall establish standards for the investigation of appeals and preparing responses to appeals, and the duties of the headquarters administrative remedy coordinator.

13. Regardless of any dismissal of an appeal for procedural or other reasons, headquarters staff shall investigate and take

appropriate action on any issue in an appeal if failure to do so could result in serious harm.

14. If the Commissioner fails to respond to an appeal within 30 calendar days of the date the Commissioner receives the appeal, or 45 calendar days of the date received if an extension is required under Section VI.M.9.b of this Directive, the appeal is considered denied, and the inmate may seek further administrative review under regulations of the IGO.

N. Regulations of the Inmate Grievance Office (IGO) include the following:

1. COMAR 12.07.01.06B provides: "An appeal from the administrative remedy procedure to the Inmate Grievance Office shall be filed within 30 days from the grievant's receipt of a response from the Commissioner [of Correction], or within 30 days of the date the Commissioner's response was due."

2. COMAR 12.07.01.06E provides: "The Inmate Grievance Office may dismiss any disciplinary proceeding appeal and any grievance within the scope of the administrative remedy procedure that has not been exhausted through all institutional remedies in a timely manner."

3. COMAR 12.07.01.06F provides: "A time limitation or procedural bar may be waived [by the Inmate Grievance Office]

for a grievance which represents a continuing problem or for which good cause is shown for a failure to proceed in a timely manner."

4. COMAR 12.07.01.07A provides: "The Executive Director shall conduct a preliminary review of a grievance to determine whether it should be dismissed or proceed to a hearing."

5. COMAR 12.07.01.07B(4) provides: "A grievance shall be dismissed on preliminary review as wholly lacking in merit if

> [t]he grievant has failed to exhaust remedies available under the administrative remedy procedure or the disciplinary proceeding in a timely manner, and has not shown good cause for the failure to do so."

O. In the Courts of the State of Maryland, judicial review of final decisions in matters before the IGO is available pursuant to Correctional Services Article, § 10-210.

1. The inmate may seek judicial review of a final decision in matters before the IGO in the Circuit Court of the County in which the inmate is confined. Correctional Services Article, § 10-210(b)(2).

2. Courts and Judicial Proceedings Article, § 5-1003(a)(1) provides: "A prisoner may not maintain a civil action until the

prisoner has fully exhausted all administrative remedies for resolving the complaint or grievance."

P. Federal law, 42 U.S.C. § 1997e(a) provides: "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Q. This series of Directives establishes policy and procedure for the operation of the Administrative Remedy Procedure throughout the Division of Correction.

R. The institutional administrative remedy coordinator or designee shall complete the Policy Management Audit Form, Appendix 7 to this Directive in June and December of each calendar year. When deficiencies are noted, a compliance plan shall be completed to address each deficiency. A copy of the completed form(s) shall be forwarded to the:

1. Institutional audit coordinator; and
2. Director, Office of Policy Development, Analysis and Management

The institutional administrative remedy coordinator or designee shall maintain a copy of the form for review during the Headquarters Administrative Remedy Audit.

S. No institutional directives are required or permitted.

VII. Attachments:

A. Appendix 1, Administrative Remedy Procedure Limitation Request (DOC Form 185-002aR)
B. Appendix 2, Informal Inmate Complaint Form (DOC Form 185-002bR)
C. Appendix 3, Request for Administrative Remedy (DOC Form 185-002c)
D. Appendix 4, Extension Form (DOC Form 185-002dR)
E. Appendix 5, Withdrawal Form (DOC Form 185-002eR)
F. Appendix 6, Headquarters Appeal of Administrative Remedy Response (DOC Form 185-002fR)
G. Appendix 7, Policy Management Audit Form (DOC Form 1-2aR) and Policy Management Compliance Plan (DOC Form 1-2bR)

VIII. Rescissions:

185-001: Table of Contents, dated April 1, 1993
185-002: Administrative Remedy Procedure Policy, dated February 15, 2005
185-100: Administrative Remedy Procedure Description, dated April 1, 1993
185-101: Time Frames, dated April 1, 1993
185-200: Institution Program Orientation and Management, dated April 1, 1993
185-201: Inmate Orientation, dated April 1, 1993
185-202: Staff Awareness, dated April 1, 1993
185-203: Informal Resolution Procedure, dated April 1, 1993
185-204: Preliminary Review of a Request for Administrative Remedy, dated April 1, 1993

185-205: Administrative Dismissal of a Request, dated April 1, 1993
185-206: Acceptance and Investigation of a Request for Administrative Remedy, dated April 1, 1993
185-207: Warden's Response to a Request for Administrative Remedy, dated April 1, 1993
185-208: Providing Relief to a Request for Administrative Remedy, dated April 1, 1993
185-300: Headquarters Program Organization and Management, dated April 1, 1993
185-301: Administrative Dismissal of an Appeal, dated April 1, 1993
185-302: Acceptance and Investigation of a Headquarters Appeal of Administrative Remedy Response, dated April 1, 1993
185-303: Commissioner's Response to a Headquarters Appeal of Administrative Remedy Response, dated April 1, 1993
185-304: Providing Relief to the Inmate, dated April 1, 1993
185-305: Adverse Effect Request, dated April 1, 1993
185-400: Program Description of Procedures for Inmates, dated April 1, 1993
185-401: Submitting a Complaint for Informal Resolution, dated April 1, 1993
185-402: Submitting a Request for Administrative Remedy, dated April 1, 1993
185-403: Submitting a Headquarters Appeal of Administrative Remedy Response, dated April 1, 1993
185-500: Professional Training and Development, dated April 1, 1993

185-600: Documentation and Reporting, dated April 1, 1993
185-700: Audits, dated April 1, 1993

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STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
DIVISION OF CORRECTION

[SEAL] **DIVISION OF CORRECTION DIRECTIVE**	**PROGRAM: ADMINISTRATIVE REMEDY PROCEDURE**
	DCD #: 185-003
	TITLE: Institutional Administrative Remedy Procedures
	ISSUED: August 27, 2008
	EFFECTIVE: August 27, 2008
	AUTHORITY: /s/ Paul B. O'Flaherty **Paul O'Flaherty** **Assistant Commissioner**
	APPROVED: /s/ J. Michael Stouffer **J. Michael Stouffer** **Commissioner**

I. References:

A. Suits by Prisoners, 42 U.S.C.§ 1997e(a)
B. Correctional Services Article, §§ 10-201 through 10-210, Annotated Code of Maryland
C. Courts and Judicial Proceedings Article, §§ 5-1001 through 5-1007, Annotated Code of Maryland

D. COMAR 12.02.27 and COMAR 12.07.01.
E. DCD 175-2 and 250-1

II. Applicable to: All Division of Correction (DOC) inmates housed in DOC institutions and facilities and all DOC staff.

III. Purpose: To establish procedure for wardens and institutional staff to implement policy as stated in DCD 185-002.

IV. Definition: None.

V. Policy: It is the policy of the Division of Correction that:

A. Staff and inmates shall be encouraged to make a good faith effort to resolve all institutionally related inmate complaints at the lowest possible level.

B. Inmates shall seek formal resolution initially through the Administrative Remedy Procedure when attempts at informal resolution fail or are not pursued.

C. Inmates shall adhere to the time periods and other requirements set forth in this Directive and should not expect that any late submission will be considered.

D. Requests for administrative remedy and appeals under the Administrative Remedy Procedure be answered on the merits and that substantive relief be provided to the inmate when warranted.

VI. Procedures:

A. Warden

1. The warden is responsible for the operation of the administrative remedy procedure at the institutional level and for ensuring institutional compliance.

2. The warden shall:

a. Designate a correctional case management specialist, supervisor, manager, or correctional officer as the institutional administrative remedy coordinator and designate an alternate to function as coordinator in the coordinator's absence;

b. Designate one supervisor within each department (who shall be referred to as the departmental liaison throughout this series of directives) to serve as an investigator and/or to delegate investigations to departmental staff (this includes the medical department);

c. Ensure that all inmates and staff are aware of the administrative remedy procedure;

d. Encourage the use of the informal resolution process by staff and inmates to resolve inmate complaints at the lowest possible level by directing staff to actively participate

in the resolution of inmate complaints;

e. Respond to all complaints within the prescribed time frame; and

f. Manage the institution's compliance with the administrative remedy directives through the institutional coordinator.

B. Administrative Remedy Coordinator (ARC)

1. The administrative remedy coordinator is responsible for managing the operation of the administrative remedy procedure within the institution.

2. The coordinator shall:

a. Process all formal complaints submitted through the administrative remedy procedure;

b. Ensure that all institutional staff responsibilities for administrative remedy are completed consistent with established procedures;

c. Report to the warden any noncompliance with procedures which affect the ability to meet established time frames;

d. Ensure the availability of all appropriate administrative remedy forms to all inmates by supplying these forms to the case management

department, housing unit officers, and the inmate library;

e. Make appropriate accommodations for any inmate who is not proficient in the English language so that the inmate has access to the ARP process; and

f. Process all complaints consistent with the procedures and time frames established in the administrative remedy DCDs.

C. Department Liaisons

1. Department liaisons shall be the administrative remedy coordinator's point of contact for all investigations related to that department.

2. Department liaisons may choose to either conduct the investigations themselves or assign the complaint to an employee in that department for investigation.

D. Investigators

1. Investigators shall investigate each case assigned to them in accordance with the procedures established in this directive utilizing the Administrative Remedy Procedure Case Summary, Appendix 1 to this directive.

2. Investigators shall be responsible and accountable for submitting completed

investigations back to the ARC by the due date.

E. Preliminary Review of an Administrative Remedy Procedure (ARP) Request

1. The warden or the institutional coordinator shall conduct a preliminary review of each request for administrative remedy to determine if the inmate's complaint concerns an emergency request or if the complaint is frivolous or malicious.

2. If is determined that the complaint concerns an emergency request, all regular time limits and procedural requirements shall be set aside and the warden or designee shall, without further substantive review of the request:

   a. Accelerate the investigative process;

   b. Direct immediate corrective action; and/or

   c. Notify the institutional health care provider of any medical complaints that are determined to be emergencies.

3. If the warden determines that the complaint is frivolous or malicious, the warden shall:

   a. Complete Part B of Appendix 3 to DCD 185-002,

b. Indicate that the request is dismissed for procedural reasons final as frivolous or malicious or both;

c. Forward the request to the institutional coordinator to be indexed, copied, and distributed; and

d. Review the request to determine if the inmate properly completed an ARP request as required by DCD 185-002.

4. If the inmate fails to properly complete the ARP request and if this failure is vital to determining the inmate's interest or basis for the investigation, the ARC shall dismiss the complaint for procedural reasons pending resubmission.

5. Inmates are encouraged but not required to list the steps taken to resolve their complaint informally and a complaint should not be dismissed for procedural reasons pending resubmission to obtain this information.

F. Resubmitting a Request

1. If the institutional coordinator has dismissed a request for procedural reasons as insufficient or incomplete and issued instructions for resubmitting the request, the inmate may resubmit the request to the warden, one time only, by:

a. Completing a new Request for Administrative Remedy; and

b. Following the specific instructions provided by the institutional coordinator in the receipt portion of Part C (Appendix 3 to DCD 185-002) of the Request for Administrative Remedy.

2. Failure to resubmit the request in accordance with the coordinator's instructions shall result in a dismissal for procedural reasons final of the request which is subject to non-concurrence by the headquarters coordinator.

G. Inmates shall submit their request for administrative remedy to an officer in the control center of the inmate's housing unit, a tier officer, or a custody supervisor. The request will be processed by the officer in accordance with the instructions in DCD 185-002.

H. The warden may issue an Institutional Bulletin (IB) designating a location to which officers shall deliver the requests.

1. The IB may designate a time and place for inmates to submit their requests.

2. The warden shall ensure that all inmates have at least a daily opportunity to turn in their requests.

3. The requests shall be stamped daily either by staff assigned to the Warden's office or the institutional coordinator. The time frame for indexing starts from the stamp date.

I. The warden's time frame for responding to a request starts from the date that the officer signs the request.

J. An inmate may, for any reason, withdraw a complaint by submitting to the institutional or headquarters coordinator a completed Withdrawal Form, Appendix 5 to DCD 185-002. The coordinator shall ensure that:

1. The Withdrawal Form is included in the ARP file; and

2. The inmate is offered a copy.

K. Indexing and Assigning Case Numbers

1. The administrative remedy coordinator shall maintain the Administrative Remedy Index, Appendix 2 to this directive, to record requests for administrative remedy within five working days of the date stamp on the request. The coordinator shall ensure that:

a. The index is maintained electronically with the ability to search for requests by year, inmate name, subject code, and disposition code.

b. A new index form is used at the beginning of each calendar month. Enter the institution, month, and year at the top of the form.

c. Each request received is assigned a case number consisting of the institution's initials followed by a four digit sequential number followed by

the last two digits of the year. The four digit number shall begin at 0001 and return to that number on January 1 of each year. (Example: MCTC-0001-08 would be the number for the first request received by the institutional coordinator of the Maryland Correctional Training Center for the calendar year 2008).

d. Each case which is resubmitted in accordance with the coordinator's instructions retains the assigned case number.

e. Each case that is returned from the headquarters coordinator due to a non-concurrence of the institutional coordinator's rationale for a dismissal for procedural reasons retains the assigned case number and is investigated.

2. The first five columns should be completed as the request or appeal is indexed.

a. The first column shall contain the assigned case number.

b. The second column shall contain the inmate's name

c. The third column shall contain the inmate's DOC number.

d. The fourth column shall contain the date of the month on which the complaint was indexed.

e. The fifth column, if applicable, shall contain either:

(1) The number code "5" from the disposition codes indicating that a request has been dismissed for procedural reasons pending resubmission; or

(2) The number code "7" indicating that the case has been returned for investigation due to a non-concur of a dismissal for procedural reasons by the Headquarters Coordinator.

(3) Column five shall also contain the date on which the resubmitted request is indexed and accepted or the date the non-concur is indexed and accepted.

f. Column six shall contain the subject code(s) identifying the nature of the complaint. Codes are provided on the reverse side of the index form. The coordinator is responsible for establishing which code is the most appropriate. No more than two subject codes may be entered in this column.

g. The remaining index entries shall be completed as follows:

(1) Column seven shall contain the date of the month on which the warden or commissioner signed the response or the date that the request was dismissed for procedural reasons by the institutional coordinator.

(2) Column eight shall either contain the date that the inmate signed the receipt of Warden's response or shall contain the date that the dismissal for procedural reasons by the institutional coordinator was mailed to the inmate.

(3) Column nine shall contain a one-digit number from the coding sheet located on the back of the index indicating the disposition of the complaint.

(4) Column ten is for the entry of a brief description of the inmate's complaint, the reason for the dismissal for procedural reasons of the complaint, or the date that the resubmitted request is due.

h. Each line of the index form shall be used through the last entry on the last date of the month.

i. By the tenth working day of each month, a copy of the previous month's

index shall be electronically mailed to the headquarters administrative remedy office.

j. The coordinator shall ensure that the index is properly updated as dispositions are rendered in previously unresolved cases.

k. When dispositions have been made for all cases indexed for the month, a copy of the completed index shall be electronically mailed to the headquarters coordinator.

L. Administrative Remedy Procedure Files

1. The administrative remedy coordinator shall maintain a centralized file with a copy of each closed administrative remedy request or appeal with any investigative findings or documentation attached.

a. Files shall be maintained chronologically by month and year in the order indexed. A copy of the monthly index shall be kept in the front of each file separating each new month as a directory to the file's contents.

b. Files from the previous year may be stored or archived on January 1st of the following year. For example, all 2006 files shall be stored or archived effective January 1, 2007 The files shall be stored by year in order of case number with a copy of that year's index in the front. The files

shall be kept for at least four years following the final disposition of the request and then shall be destroyed.

2. The Warden may authorize these files to be stored electronically provided these files are recoverable should the institution's computers fail.

M. Quarterly Reports

1. Institutional coordinators shall accumulate aggregate data regarding the number and types of requests by subject code heading as listed on the reverse side of the index form using the Request for Administrative Remedy Quarterly Report, Appendix 3 to this directive.

2. Reports of the data are to be maintained by the institutional coordinator and available upon request or in the event of an audit.

N. Dismissal of a Request for Procedural Reasons

1. The institutional coordinator shall dismiss the request for procedural reasons pending resubmission when the inmate has failed to properly complete all sections of the request or when the inmate has failed to provide sufficient information or specific information within the complaint essential for the completion of its investigation. (Note: A request without an officer's signature is considered

incomplete.) The institutional coordinator shall:

a. Provide in the receipt portion, Part C (Appendix 3 to DCD 185-002), the reason(s) why the request is incomplete;

b Provide specific instructions for the inmate to properly complete the request for administrative remedy;

c. Provide the specific due date of the resubmitted request which is the later of 15 calendar days from dismissal or within the original 30 day time frame; and

d. Return the request and a blank request for administrative remedy to the inmate and keep one copy for the file.

2. Failure by the inmate to resubmit the request in accordance with the coordinator's instructions or failure to resubmit by the due date given shall result in a final dismissal for procedural reasons at the institutional coordinator's discretion subject to non-concurrence by the headquarters coordinator.

a. If the inmate fails to resubmit the request, the disposition date in column seven of the index shall be the date that the resubmission was due.

b. If the resubmission is received after the due date, the disposition date is still the date that the resubmission was due, but the date that the late resubmission is received shall be noted in column ten.

3. The institutional coordinator shall:

a. Accept a late filing or take appropriate action outside of the ARP process for good cause if failure to do so could result in serious harm.

b. Issue a final dismissal of a request for procedural reasons when the request is regarding any of the following issues:

(1) Case management recommendations and decisions;

(2) Maryland Parole Commission procedures and decisions;

(3) Adjustment hearing procedures and decisions; and

(4) Appeals of notices of decision withhold mail.

c. Issue a final dismissal of a request for procedural reasons when the inmate has failed to submit the request within the proper time frame unless the inmate establishes that extraordinary circumstances prevented the inmate from filing the request in a timely manner. The

institutional coordinator may, as necessary, refer dismissed cases to appropriate institutional staff for evaluation and follow-up outside of the administrative remedy procedure.

d. Issue a final dismissal of a request for procedural reasons when the inmate's complaint is one which has been previously resolved, is repetitive, or had been previously addressed through the administrative remedy procedure. The coordinator shall note the case number of the request that previously addressed the same issue.

e. Issue a final dismissal of a request for procedural reasons when the request is in excess of that inmate's monthly limit as established by the Commissioner of Correction.

4. The Warden or institutional coordinator shall issue a final dismissal of a request for procedural reasons when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit (IIU).

a. The dismissal must refer to IIU's case number.

b. The response shall read: "Your request is dismissed for procedural

reasons final. This issue is being investigated by IIU, case number: ___. Since this case shall be investigated by IIU, no further action shall be taken within the ARP process."

5. When a request is dismissed for procedural reasons by the coordinator, the coordinator shall:

   a. Provide in the receipt portion, Part C (Appendix 3 to DCD 185-002), the rationale for the dismissal for procedural reasons; and

   b. Sign and date part C (Appendix 3 to DCD 185-002).

6. The coordinator shall return any request which is dismissed for procedural reasons to the inmate on the date the request is indexed and reviewed and ensure that the completed dismissed request for administrative remedy is distributed as follows:

   a. Original and one copy to the inmate; and

   b. One copy to the administrative remedy file maintained by the coordinator.

7 A final dismissal for procedural reasons of a request by the warden or institutional coordinator shall be treated as a substantive decision and the rationale

for dismissal may be appealed by the inmate.

O. Accepting and Investigating a Request for Administrative Remedy

1. The institutional coordinator shall accept requests which are not dismissed for procedural reasons for investigation and response.

2. On the date the request is indexed, the coordinator shall:

   a. Send the receipt portion, Part C (Appendix 3 to DCD 185-002), of the request for administrative remedy to the inmate;

   b. Review each request to determine the nature of the complaint and the departmental liaison(s) to whom the investigation should be assigned; and

   c. Assign the request to the departmental liaison(s) for investigation within 20 calendar days or less.

3. For cross-over cases:

   a. The coordinator of the indexing institution shall send the original request to the coordinator of the institution where the basis for the complaint occurred and shall retain a copy for the file.

b. The receiving institutional coordinator shall assign the case to the applicable department liaison(s).

c. The institution where the incident occurred shall be responsible for investigating the request; and

d. The Warden of that institution shall be responsible for responding to the request.

e. The original Warden's response, case summary, and supporting documentation shall then be forwarded to the indexing institution so that that coordinator can update the index and ensure that the request is distributed to the inmate.

f. Both institutions shall maintain an ARP file on the case.

4. Upon receipt, the departmental liaison(s) shall either investigate the request or assign the request to a staff person within that department for investigation.

5. One or more employees may participate in the investigation of a complaint, provided there is no conflict of interest.

a. If a case is assigned to an employee who believes that participation in the investigation would be a conflict of interest, that employee must notify the departmental liaison and substantiate that conflict.

b. If the departmental liaison determines that there is a conflict of interest, the departmental liaison shall then assign the investigation to a different employee.

6. The assigned investigator shall, at a minimum, complete each of the following steps and document that completion on the Administrative Remedy Procedure Case Summary, Appendix 1 to this directive. Instructions for completing the case summary are as follows:

   a. Conduct Interviews: Absent good cause, all relevant persons must be interviewed to establish the basis of the inmate's complaint and the chronology of the events. Relevant persons are:

      (1) The inmate;

      (2) All relevant witnesses named by the inmate; and

      (3) All relevant employees, including medical staff.

   b. If the person interviewed is a staff member, that person shall provide a written report of the facts absent good cause (such as being out on extended leave).

   c. If the complaint is one which involves a situation affecting a group of inmates and interviews of the

complainants would disrupt institutional security, operations, or schedules, no interviews shall be required. However, the reason for the lack of interviews must be documented in writing on the Administrative Remedy Procedure Case Summary, Appendix 1 to this Directive.

d. At the Maryland Correctional Adjustment Center and at the North Branch Correctional Institution, interviews of complainants and relevant inmate witnesses may be conducted via the intercom system to accommodate security requirements. However, personal contact interviews must be conducted, absent good cause, if the intercom is inoperable at the time of the interviews.

7 Establish the Specific Findings of Fact

a. All reports submitted regarding the case shall be reviewed by the investigator.

b. Based on the testimony of witnesses and the information contained in the reports submitted, the investigator shall establish and list any actions or events in the order of their occurrence and shall list any additional facts in the case.

8. Review All Relevant Documents

   a. The investigator shall review all relevant directives, institutional directives, bulletins, etc., to establish that all actions were taken in accordance with current policy and procedure.

   b. Any supporting document must be included in the ARP file.

9. Make a Recommendation

   a. The investigator shall make a recommendation for a finding of meritorious, meritorious in part, or dismissal and shall draft a suitable response for the coordinator's review.

   b. The assigned investigator shall submit to the departmental liaison all findings, recommendations, and supporting documentation for return to the institutional coordinator within the time frame specified.

10. The coordinator shall review the investigation for completion of all investigative steps, sufficiency of documentation, and application of all relevant directives, etc., and review the recommendation and draft a response.

11. Investigations which are found by the coordinator to be incomplete or insufficient or in which the recommendations

are not supported by investigative material shall be returned to the investigator with specific instructions for reinvestigation and resubmission.

12. All investigative reports and reinvestigations must be submitted within the time frame.

13. Upon the withdrawal of a request by an inmate the coordinator shall:

    a Notify the appropriate departmental liaison to halt the investigation of the request; and

    b. Document the disposition of the case on the index.

14. If it is found that thirty calendar days is insufficient to complete the investigation and respond to the inmate's request, the Warden is permitted one extension of fifteen (15) calendar days.

    a. The inmate's consent to the extension is not required.

    b. The Warden or designee shall provide written notification, using the Extension Form (Appendix 4 to DCD 185-002), to the inmate regarding the 15 day extension within the original 30 day timeframe.

    c. A copy of the extension form shall be maintained in the ARP file.

15. Upon receipt of the completed case summary from the departmental liaison, the coordinator shall prepare an appropriate response for the warden's review and signature in Part B (Appendix 3 to DCD 185-002) of the Request for Administrative Remedy. The prepared response shall be based upon:

    a. The case summary;

    b. Documents and reports attached; and

    c. The investigator's recommended response.

16. The response should:

    a. Address fully all issues and allegations raised in the complaint;

    b. Be easily understood;

    c. State clearly the facts upon which the decision is based; and

    d. The first sentence of the warden's response should clearly state the disposition of the inmate's complaint as:

        (1) Meritorious;

        (2) Meritorious in part; or

        (3) Dismissed, as defined in DCD 185-001.

17. The warden shall review the response to ensure that the complaint has been satisfactorily resolved and that the response is appropriate.

    a. If the above criteria have been met, the warden shall sign the response in the space provided in Part B (Appendix 3 to DCD 185-002) of the Request for Administrative Remedy; or

    b. If the above criteria have not been met to the warden's satisfaction, the warden shall return all information to the coordinator for either:

        (1) A reinvestigation for additional information; or

        (2) A revised response.

18. The institutional coordinator shall ensure that the completed Request for Administrative Remedy is distributed as follows:

    a. Original and one copy to the inmate; and

    b. One copy to the administrative remedy file maintained by the coordinator.

19. The inmate shall sign and date the Receipt of Warden's Response, Appendix 4 to this directive, upon delivery of the response.

a. One copy of the receipt is issued to the inmate; and

b. One copy of the receipt is forwarded to the institutional coordinator to be maintained in the institutional ARP file. This date shall be noted in column eight of the index.

20. The inmate may appeal the warden's decision in accordance with policy as stated in the 185 series.

P. Meritorious or Meritorious in Part Cases

1. When the disposition of an administrative remedy request is meritorious or meritorious in part and relief specified in the warden's response has not been fully provided to the inmate at the time of the response, the warden shall clearly instruct appropriate staff, in writing, to:

a. Provide the relief specified; and

b. Provide written documentation of the relief provided to the institutional coordinator.

2. The warden may also initiate a change in institutional policy or procedure, if deemed appropriate, as a provision of relief or make a recommendation to the Commissioner or designee for a change in division policy or procedure and acknowledge this action in the response.

3. The warden shall ensure that:

   a. Staff provides full relief, as specified in the warden's response; and

   b. Staff provides documentation of that relief within ten calendar days of the date of the response.

4. The institutional coordinator shall monitor meritorious or meritorious in part cases for compliance by maintaining active cases in a separate location from the dismissed cases or the closed meritorious or meritorious in part cases by:

   a. Filing such cases chronologically, by calendar due date which shall always be ten calendar days from the date of the warden's response;

   b. Monitoring the file on no less than a weekly basis for staff compliance;

   c. Notifying the warden when staff fails to provide the relief specified within the proper time frame; and

   d. Placing the documentation of the relief provided in the administrative remedy file upon receipt.

5. When relief is provided, the case shall be considered closed and filed in accordance with this directive.

6. When the relief includes monetary reimbursement for property, the value of the property at the time of loss should be

calculated utilizing Appendix 3 to DCD 220-008.

7 The inmate should then be presented with the reimbursement value of the property and be asked to sign Appendix 1 to DCD 220-008 which shall indicate whether or not the inmate accepts the settlement.

8. If the inmate accepts the settlement, the money should be placed in the inmate's institutional money account under the authority of the Warden and without the review process described in DCD 220-008.

9. For purposes of appeal, if the inmate accepts the settlement offered the amount is considered to be correct and all issues in that request are considered settled.

10. If the inmate refuses to accept the settlement, that fact shall be documented on Appendix 1 to DCD 220-008 and that form shall be placed in the ARP file. That case is considered closed and no money shall be placed in the inmate's account. The inmate may appeal to the Commissioner within the proper time frame.

11. If at the time of Warden's response, the inmate has already refused settlement, the Warden shall:

    a. State that the request is meritorious in part;

b. List the property that the Warden agrees was lost or damaged due to staff negligence;

c. State what amount was offered to the inmate; and

d. State that no money shall be deposited into the inmate's account due to the inmate's refusal to accept settlement.

Q. Inmate Orientation

1. The Introduction to the Administrative Remedy Procedure, Appendix 5 to this DCD shall be read during the orientation of all newly arriving inmates at MRDCC, MCI-W, and all maintaining institutions.

2. All wardens shall ensure that the Introduction to the Administrative Remedy Procedure is incorporated into the institutional inmate handbooks.

R. Staff Awareness

1. The warden shall mandate that all new employees be given and sign for the Administrative Remedy Procedure Fact Sheet for New Employees, Appendix 6 to this directive, about the administrative remedy process.

2. The fact sheet shall be maintained in the employee's personnel file kept by the institution.

VII. Attachments:

A. Appendix 1, Administrative Remedy Procedure Case Summary, DOC Form 185-003aR

B. Appendix 2, Administrative Remedy Index, DOC Form 185-003bR

C. Appendix 3, Request for Administrative Remedy Quarterly Report, DOC Form 185-003cR

D. Appendix 4, Receipt of Warden's Response, DOC Form 185-003d

E. Appendix 5, Introduction to the Administrative Remedy Procedure

F. Appendix 6, Administrative Remedy Procedure Fact Sheet for New Employees

G. Appendix 7, Policy Management Audit Form (DOC Form 1-2aR)

H. Appendix 8, Policy Management Compliance Plan (DOC Form 1-2bR)

VIII. Rescissions: None.

Distribution: A
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SUPREME COURT, U.S.
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No. 15-339

In The
Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Did the Fourth Circuit misapply this Court's precedents in holding, in conflict with several other federal courts of appeals, that there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believed that he had satisfied exhaustion by participating in an internal investigation?

PARTIES TO THE PROCEEDINGS

The petitioner is Lieutenant Michael Ross, a correctional officer employed by the Maryland Department of Public Safety and Correctional Services ("Department"). The respondent is Shaidon Blake, a prisoner in the Department's custody.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Fourth Circuit are reported at 787 F.3d 693 (4th Cir. 2015). Pet. App. 1-29. The opinion and order of the United States District Court for the District of Maryland are unreported. Pet. App. 29-63.

JURISDICTION

The basis for jurisdiction in the district court was 28 U.S.C. § 1331. The court of appeals issued its decision on May 21, 2015. On June 16, 2015, the court of appeals denied Lt. Ross's petition for rehearing en banc. Pet. App. 64. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states in relevant part:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal Law, by a prisoner confined in any jail, prison, or other

correctional facility until such administrative remedies as are available are exhausted.

STATEMENT

The Prison Litigation Reform Act of 1995 ("PLRA") requires that a prisoner "properly" exhaust available administrative remedies before bringing an action with respect to prison conditions, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006), including an action that claims the use of excessive force by prison guards, *Porter v. Nussle*, 534 U.S. 516, 532 (2002). The PLRA's exhaustion provision is mandatory, and this Court will not read exceptions into it where "Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). This case presents the question of the validity of a judicially-crafted exception to the PLRA's "proper" exhaustion requirement where a prisoner "reasonably," but erroneously, believes that he satisfied the requirement.

1. Congress's Adoption of Mandatory Exhaustion of Administrative Remedies for Prisoner Litigation

Congress enacted the PLRA to reform prisoner litigation, "stem the tide" of meritless prisoner lawsuits that were overwhelming the federal judiciary, 141 Cong. Rec. S7527 (daily ed. May 25, 1995) (remarks of Sen. Kyl), *reprinted in* 1 Legislative History of the Prison Litigation Reform Act of 1996, Pub. L.

No. 104-134, at doc. 14 (Bernard D. Reems, Jr. & William H. Manz eds., 1997) (hereinafter Reems & Manz), and "reduce the intrusion of the courts into the administration of the prisons," 141 Cong. Rec. H14098 (daily ed. Dec. 6, 1995) (remarks of Rep. LoBiondo), *reprinted in* Reems & Manz, at doc. 18.

In 1995, the federal courts were faced with "an alarming explosion in the number of lawsuits filed by State and Federal prisoners." 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole), *reprinted in* Reems & Manz, at doc. 18. The number of prisoner lawsuits filed in federal courts had increased from 13,629 in 1980 to 41,679 in 1995, when they constituted nearly 17 percent of the total civil cases filed in federal district courts. United States Courts, Statistics & Reports, U.S. District Courts Judicial Business Tables, Table C-2 (Sept. 30, 1980 – Sept. 30, 1995). Prisoner lawsuits were "clogging the courts and draining precious judicial resources." 141 Cong. Rec. S7526 (daily ed. May 25, 1995) (remarks of Sen. Kyl), *reprinted in* Reems & Manz, at doc. 8.

Moreover, a "high percentage" of prisoner suits were "meritless, and many [were] transparently frivolous." *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988). These suits "tie[d] up the courts, waste[d] judicial resources, and affect[ed] the quality of justice." 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole), *reprinted in* Reems & Manz, at doc. 12. As one federal judge put it, a prisoner who "actually suffers a meaningful deprivation must hope that in that sea of frivolous prisoner

complaints, his lone, legitimate cry for relief will be heard by a clerk, magistrate or judge grown weary of battling the waves of frivolity." *Cotner v. Campbell*, 618 F. Supp. 1091, 1096 (E.D. Okla. 1985), *aff'd in part, vacated in part sub nom. Cotner v. Hopkins*, 795 F.2d 900 (10th Cir. 1986).

Congress had enacted a limited exhaustion provision in 1980 to ease the burden of prisoner litigation on the federal courts, *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 509 (1982), but the law did not have much of an effect. Under the 1980 Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349, a district court had discretion to temporarily stay litigation brought by a prisoner challenging prison conditions while the prisoner exhausted administrative remedies. That discretion could be exercised only if the prison's administrative process was found to be "plain, speedy, and effective"[1] *and* the court found that exhaustion was "appropriate and in the interests of justice." *Porter*, 534 U.S. at 523 (quoting CRIPA, Pub. L. No.

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[1] The 1980 statute required the United States Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances." 42 U.S.C. § 1997e(b)(1) (1994). A district court could require exhaustion only if "the Attorney General ha[d] certified or the court ha[d] determined that such administrative remedies [were] in substantial compliance with the minimum acceptable standards" issued by the Attorney General "or [were] otherwise fair and effective." 42 U.S.C. § 1997e(b)(2) (1994).

96-247, 94 Stat. 35, as amended, 42 U.S.C. § 1997e (1994)).

Because CRIPA's limited exhaustion provision had been so ineffective, Congress replaced it with the PLRA's mandatory, pre-filing exhaustion requirement: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Thus, in enacting the PLRA, Congress "eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy, and effective' before exhaustion could be required." *Booth*, 532 U.S. at 739. Congress expected that this change would reduce the quantity and improve the quality of prisoner suits in at least three ways. As this Court has explained, the PLRA (1) provides "prisons with a fair opportunity to correct their own errors," (2) "persuade[s]" some prisoners "not to file an action," and (3) creates an administrative record that assists courts in evaluating the merits of each case. *See Woodford*, 548 U.S. at 94-95.

In addition, by removing the requirement that the Attorney General and the courts pre-screen States' grievance procedures to ensure that they met certain minimum standards, the PLRA furthered another important congressional purpose: to end the federal courts' micromanagement of the States' prison

systems. *Woodford*, 548 U.S. at 93 ("PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons"); 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (remarks of Sen. Hatch) ("We believe that it is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners."), *reprinted in* Reems & Manz, at doc. 12; 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (remarks of Rep. LoBiondo) (stating that the PLRA would "[r]educe the intrusion of the courts into the administration of the prisons"), *reprinted in* Reems & Manz, at doc. 19.

2. Maryland's Administrative Remedy Procedures

Maryland has a simple process to address inmate grievances that applies to "all types of complaints" a prisoner may have, with only four limited exceptions that are not relevant here.[2] Pet. App. 77-78; J.A. 312. The process, which expressly covers complaints about the "use of force," J.A. 312, is initiated by an inmate with a simple request for an administrative remedy (or "ARP") submitted to the warden of the institution. Pet. App. 8, 77-78. The administrative remedy process

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[2] The exceptions pertain only to complaints about parole decisions, inmate discipline, the withholding of mail, and inmate classification. Pet. App. 77-78; J.A. 312.

allows for a variety of forms of relief, including "redress" and "compensation." J.A. 320.

If the initial request is denied, the inmate may appeal to the State's Commissioner of Correction, who oversees Maryland's prison system. Pet. App. 8, 78. If that appeal is denied, the inmate may then appeal the Commissioner's decision to the Inmate Grievance Office, an independent entity outside the institution and within the Department. Pet. App. 8, 78.

The Department's Division of Correction (the "Division"), which manages the State's prisons, offers numerous resources to ensure that inmates understand the grievance process. The Division publishes directives that govern the process, *see* J.A. 311-27 (excerpts from directives applicable at the time of the events in this case), and makes those directives available in the prison library, Pet. App. 78. The Division also gives a mandatory orientation that covers the grievance procedures, Pet. App. 74-75, and provides every inmate a handbook that summarizes the procedures in layman's terms, Pet. App. 77-81. The handbook explains that a full description of the administrative remedy process is available in the prison library and that each institution has an administrative remedy coordinator to provide forms, assist in filling out forms, and answer questions about the process. Pet. App. 78. The handbook also cautions inmates to pay attention to directions and filing deadlines that are stated on the forms. Pet. App. 78.

If the administrative remedy procedure is not available for a particular type of claim, an inmate may file a grievance directly with the Inmate Grievance Office. J.A. 315 (explaining that the Inmate Grievance Office has the power to hear a grievance in the first instance); *see also* Md. Code Ann., Corr. Servs. § 10-206 (providing that inmates may submit any grievance to the Inmate Grievance Office, but authorizing that office to require inmates to first exhaust the ARP, if available); Code of Maryland Regulations ("COMAR") § 12.07.01.02D (providing that an inmate need exhaust the ARP process before filing grievance with the Inmate Grievance Office only if the ARP is available). Among other remedies, the Inmate Grievance Office's regulations allow for an award of compensation to an inmate. COMAR § 12.07.01.10D.

3. The Internal Investigative Unit

The Department's Internal Investigative Unit ("IIU") is charged with investigating alleged criminal law violations, and other serious misconduct by correctional officers and other employees, and alleged criminal law violations committed by inmates, visitors, and other individuals that affect the safety or security of the Department's facilities or programs. Md. Code Ann., Corr. Servs. § 10-701(a); COMAR § 12.11.01.03A(1). The IIU does not have any authority to remedy a prisoner's complaint, nor does it have any authority to discipline a correctional officer or other employee. Md. Code Ann., Corr. Servs. § 10-701

(providing that the IIU's authority is limited to investigating alleged criminal acts and other misconduct of employees and others and reporting the results of the investigation); COMAR § 12.11.01.03 (same). The IIU's role in the disciplinary process of correctional officers is merely investigatory. *See* Md. Code Ann., Corr. Servs. Title 10, subtitle 9 (establishing exclusive procedures for investigation and discipline of correctional officers for misconduct); COMAR Title 12, subtitle 11, ch. 1 (setting forth the limited scope of IIU's investigatory and reporting responsibilities); Md. Code Ann., Corr. Servs. §§ 10-907 – 10-911 (providing that IIU conducts investigation but disciplinary proceedings are conducted by other officials within the Department). Thus, under Maryland law, discipline of correctional officers is entirely separate from both the administrative remedy procedure and the Inmate Grievance Office.

4. Factual Background

Respondent Shaidon Blake is a prisoner, serving a sentence of life imprisonment, in the custody of the State of Maryland. J.A. 226. In June 2007, Mr. Blake was an inmate at the Maryland Reception, Diagnostic and Classification Center. Pet. App. 3.

On June 21, 2007, as a result of conduct observed during a recreation period, Candis Fields, the supervising officer, charged Mr. Blake with several disciplinary infractions, which required that he be placed in the segregation unit. J.A. 201, 205, 221-22. While

then-Lieutenant James Madigan and then-Sergeant Michael Ross were escorting Mr. Blake from his cell to the segregation unit, Mr. Madigan struck Mr. Blake in the face multiple times. J.A. 203. After Captain Calvin Vincent's preliminary investigation concluded that Mr. Madigan used excessive force, J.A. 245-48, Captain Vincent recommended that Mr. Madigan be disciplined, J.A. 203-04, and made a referral to IIU to investigate Mr. Madigan's alleged assault of Mr. Blake, J.A. 186, 191, 196, 248. Captain Vincent also recommended that the warden take disciplinary action against Mr. Madigan. J.A. 204. Effective July 13, 2007, Mr. Madigan resigned in lieu of termination. J.A. 259, 260.[3]

Mr. Blake admitted having received, prior to the incident, a copy of the inmate handbook, which contains information about the administrative remedy process. J.A. 148. However, Mr. Blake did not, at that time or subsequently, initiate an ARP grievance or file any claim directly with the Inmate Grievance Office related to this incident. Mr. Blake has admitted that he never read the Division's directives about the

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[3] In June 2007, when this incident took place, the authorized state official was required to take disciplinary action against a correctional officer within 30 days from the date the official became aware of the officer's misconduct. *Western Corr. Inst. v. Geiger*, 371 Md. 125, 129 (2002) (citing Md. Code Ann., State Pers. & Pens. § 11-106)). The time limitation has since been extended to 90 days for misconduct and removed for certain criminal conduct. 2010 Md. Laws ch. 194, § 1, amended by 2014 Md. Laws ch. 252, § 1.

inmate grievance procedures, and so never relied on them. J.A. 174. Instead, he merely assumed that he did not need to file for an administrative remedy because he believed that, in his words, "it was handled" through the IIU investigation. J.A. 173-74.

5. The Internal Investigation

Based on Captain Vincent's referral, an IIU investigator began a criminal investigation into Mr. Madigan's assault on Mr. Blake. J.A. 191-92. On September 30, 2008, the investigator filed the IIU criminal investigation report recommending that the criminal investigation be closed. J.A. 190, 195. The IIU report lists Mr. Blake as the inmate, Captain Vincent as the complainant, Mr. Madigan as the only suspect, the offense as "Assault by Lt. James Madigan," and the subject of the investigation as "Inmate Shidon [sic] Blake was allegedly assaulted by Lieutenant James Madigan on June 21st, 2007." J.A. 186-89. The report states that a witness statement was taken from Lt. Ross, J.A. 191, and that Lt. Ross was escorting Mr. Blake when the incident occurred, J.A. 192, 193, but otherwise does not mention Lt. Ross. A duty officer's checklist attached as an exhibit to the report similarly identifies Mr. Blake as the victim, Mr. Madigan as the suspect, and Lt. Ross as a witness. J.A. 197-98.

The IIU report summary states that Mr. Blake informed the investigator "that he did not want to pursue this case," and that he would "sign the waiver

form requesting that this case be closed." J.A. 195. The investigator then summarized the results of the investigation, finding that Mr. Blake "was struck several times by Lt. James Madigan while he was handcuffed from behind," that "Lt. James Madigan lost control of his emotions and did not act professionally," that Mr. Madigan was "removed from responsibilities with the agency" as a result of "conduct unbecoming of a correctional officer," and that "there was no injury sustained" by Mr. Blake. J.A. 195. The investigator did not make any findings with respect to Lt. Ross, J.A. 186-95, and recommended that the "case be closed with no further action," J.A. 195.

6. This Litigation

Mr. Blake filed suit against Mr. Madigan, Lt. Ross, and other state officials in the United States District Court for the District of Maryland on September 8, 2009. J.A. 10. In his pro se complaint, Mr. Blake stated (incorrectly) that he had filed a request for an administrative remedy and that, as a result, "the defendant James Madigan" had been fired. J.A. 12. Mr. Blake explained that he did not appeal that determination because the "warden appropriately dismissed [Mr. Madigan] from his job as a lieutenant" at the prison. J.A. 12.

In his statement of his claim, Mr. Blake alleged that, while he "was being escorted by Sgt. Michael Ross," and was handcuffed behind his back,

Mr. Madigan approached him and, unprovoked, pushed him while he was headed down a flight of stairs. J.A. 14. After a brief pause while Mr. Madigan went back into the unit, Mr. Madigan returned "and without warning or being provoked in any way by me started to punch me in the face" approximately seven times with a "circle key ring gripped in his hands." J.A. 14. Mr. Blake further alleged that Mr. Madigan then attempted to throw him to the ground. J.A. 14. According to Mr. Blake, Lt. Ross "made no attempts to stop the attack." J.A. 14.

Mr. Blake blamed Mr. Madigan for the assault; the State of Maryland, the Secretary of Public Safety and Correctional Services, and others for negligent hiring and oversight of Mr. Madigan; and Lt. Ross for failing to protect Mr. Blake. J.A. 15. Mr. Blake also averred that he was damaged psychologically and physically, including worsening of a pre-existing injury to his head and face that had earlier resulted in permanent nerve damage and migraine headaches.[4] J.A. 16, 183-85. After screening the complaint, the district court dismissed the claims against all of

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[4] The summary judgment record revealed that Mr. Blake had a pre-existing injury to the left side of his head and face as the result of a traumatic head injury suffered during a fall on June 5, 2006. J.A. 183-85. As a result, he suffered nerve damage, numbness, and pain on the left side of his face and was prescribed medication, including Neurotonin. *Id.* The Fourth Circuit's statement that Mr. Blake "was *later* diagnosed with nerve damage" as a result of the incident, Pet. App. 4 (emphasis added), is incorrect and lacks any basis in the record.

the defendants except Mr. Madigan and Lt. Ross and appointed counsel for Mr. Blake. J.A. 19-31.

Mr. Blake's appointed counsel consented to Lt. Ross filing an amended answer in exchange for Lt. Ross's consent to Mr. Blake filing an amended complaint. J.A. 138-39. In his amended answer, and later in his answer to the amended complaint and motion for summary judgment, Lt. Ross raised the defense of failure to exhaust administrative remedies. J.A. 36, 181. Mr. Madigan, who was represented by other counsel, did not raise that defense. J.A. 291-92.

In the amended complaint, Mr. Blake expanded his allegations against Lt. Ross, alleging that "over an extended period of time" Lt. Ross made no attempts to stop the attack "despite my repeated pleas for assistance." J.A. 144. Whereas the original complaint alleged that Mr. Madigan had acted alone in forcing Mr. Blake to the ground, the amended complaint alleged for the first time that both Lt. Ross and Mr. Madigan "took me to the ground in a violent manner" and that "Sgt. Ross acted with callous and reckless disregard for my rights." J.A. 144.

Lt. Ross explained in his deposition that Mr. Blake was initially compliant with Lt. Ross's instructions but that Mr. Blake grew increasingly antagonistic to Mr. Madigan. J.A. 62-65. Although Lt. Ross believed he had Mr. Blake under control, Mr. Madigan attempted to grab Mr. Blake's arm. J.A. 65-66. Lt. Ross made several attempts to de-escalate the situation. He assured Mr. Madigan that he,

Lt. Ross, had the situation under control, J.A. 67, 70, 71; attempted to remove Mr. Blake from the situation by moving him toward his destination, J.A. 72-73, 114, 124-25; and countermanded Mr. Madigan's directive that Officer Latia Woodard mace Mr. Blake, J.A. 74, 76-77. Lt. Ross also testified that he attempted to "take complete control of the whole situation" once Mr. Madigan gave the order to mace Mr. Blake, J.A. 79, 94, directed Officer Woodard to call other officers for assistance, J.A. 79, and tried to bring Mr. Blake to the floor for his own protection, both to end the confrontation and to ensure that other officers would not attempt to intervene in an ongoing confrontation when they arrived, J.A. 80-81, 83, 109-10, 114, 115, 116.

7. The District Court's Decision

In granting Lt. Ross's motion for summary judgment, the district court determined that Mr. Blake failed to exhaust administrative remedies. Pet. App. 60-61. On Mr. Blake's motion for reconsideration, the district court reversed that ruling as to Mr. Madigan, who had not properly raised the exhaustion defense, but confirmed it as to Lt. Ross.[5] Pet. App. 35-43.

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[5] At first, the district court mistakenly relied on amended directives describing the prison's administrative remedy, which took effect in August 2008, instead of the directives that applied at the time of the events in this case. Pet. App. 41-42; *see* J.A. 327-81 (amended directives). Under the 2008 directives, the court concluded that Mr. Blake failed to exhaust because he

(Continued on following page)

The district court observed that Mr. Blake had conceded that he was aware of the administrative remedy process and that he had received the handbook that describes that process. Pet. App. 41. The court found that Mr. Blake had failed to exhaust administrative remedies because of his own subjective belief that the IIU investigation relieved him of that requirement. Pet. App. 41. However, the court explained, this mistaken subjective belief did not satisfy Mr. Blake's burden to exhaust under the PLRA. To the contrary, the court determined that "[t]here [was] very little, if any, ambiguity in Maryland's inmate grievance procedures," and that, in any event, the IIU's investigation could not relieve Mr. Blake of his obligation to exhaust administrative remedies.[6] Pet. App. 38-39, 42.

8. The Fourth Circuit's Decision

A divided panel of the court of appeals reversed. Although Mr. Blake argued that his participation in the internal investigation constituted exhaustion under Maryland law, the court of appeals did not rule

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could have filed a grievance directly with the Inmate Grievance Office. Pet. App. 56-59. On reconsideration, the district court relied on the applicable directives from 2007, *see* J.A. 311-26, and again found that Mr. Blake failed to exhaust his administrative remedies, this time because he did not use the available administrative remedy procedure, Pet. App. 41-42.

[6] Mr. Blake's claims against Mr. Madigan proceeded, and a jury eventually found Madigan liable. J.A. 300. Mr. Madigan is not a party to this appeal.

on that basis. Instead, the court adopted a so-called "special circumstances" exception that the Second Circuit had previously adopted in *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004).[7] Pet. App. 9-10. Under that exception, the majority held, an inmate may be excused from exhausting his administrative remedies if he "reasonably believed that he had sufficiently exhausted his remedies." Pet. App. 2. The court of appeals did not cite any statutory support for this exception but, relying on Justice Breyer's concurrence in *Woodford*, claimed that the court could import "traditional" exceptions from administrative law into

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[7] *Giano* was one of five PLRA exhaustion cases decided by the Second Circuit on the same day, all but one of which was authored by Judge Calabresi. *See Abney v. New York Dep't of Corr. Servs.*, 380 F.3d 663 (2d Cir. 2004); *Hemphill v. New York*, 380 F.3d 680 (2d Cir. 2004); *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004); *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004). As Judge Calabresi explained in *Hemphill*, these cases collectively established a "three-part inquiry" to be followed in determining whether a prisoner has exhausted administrative remedies. Under this test, the court must ask: (1) whether the remedy is "available"; (2) whether the defendant waived the defense or should be estopped from raising it because of actions taken to inhibit the plaintiff from exhausting available remedies; and (3) whether, even if the plaintiff did not exhaust available remedies, "special circumstances" justify "the prisoner's failure to comply with administrative procedural requirements." 380 F.3d at 686 (citations omitted); *but see Amador v. Andrews*, 655 F.3d 89 (2d Cir. 2011) (questioning validity of this analytical framework following the decision in *Woodford*); *Ruggiero v. County of Orange*, 467 F.3d 170, 178 (2d Cir. 2006) (reporting excessive force complaint to investigator does not excuse failure to exhaust available remedies).

the PLRA. Pet. App. 9 (citing *Woodford*, 548 U.S. at 103-04 (Breyer, J., concurring)).

The court of appeals also adopted the Second Circuit's two-prong test for determining when an inmate's failure to exhaust should be excused under this reasonable belief exception: (1) whether "the prisoner was justified in believing that his complaints in the disciplinary appeal *procedurally* exhausted his administrative remedies because the prison's remedial system was confusing" and (2) "whether the prisoner's submissions in the disciplinary appeals process exhausted his remedies *in a substantive sense* by affording corrections officials time and opportunity to address complaints internally." Pet. App. 10 (emphasis in original) (quoting *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007)).

The court of appeals held that Mr. Blake satisfied both prongs of this test. With respect to the first prong, it concluded that Maryland's grievance procedures were ambiguous because they did not specifically state that the administrative remedy procedure and an IIU investigation could proceed simultaneously. Pet. App. 12-13. The majority put the burden on Lt. Ross to disprove Mr. Blake's purported interpretation and faulted the directives for failing to affirmatively contradict that interpretation. Pet. App. 14. Thus, even though it acknowledged that Mr. Blake had never read what it called "Maryland's murky inmate grievance procedures," the majority found that he had "reasonably interpreted" them by relying

on his subjective mistaken belief that he need not file a request for administrative remedy. Pet. App. 15.

With respect to the second prong, the court held that the internal investigation served the same substantive purposes as an inmate grievance procedure because the Department had "an opportunity to develop an extensive record and address the issue internally." Pet. App. 11. The court of appeals thus excused Mr. Blake's failure to exhaust his available remedies and reversed and remanded the case to the district court. Pet. App. 15.

In dissent, Judge Agee emphasized that "[j]udge-made exceptions may be permissible when interpreting judge-made exhaustion doctrines, but they hardly seem appropriate where dealing with Congressional text." Pet. App. 21 (citations omitted). Instead, he explained, this Court has rejected every attempt to "engraft exceptions that derive from the traditional doctrines of administrative exhaustion onto the PLRA's statutory exhaustion requirement," Pet. App. 22 (internal quotation marks omitted), and this Court's decision in *Woodford* "seems inconsistent with *ad hoc* exceptions like one premised on a prisoner's 'reasonable mistake,'" Pet. App. 21.

The dissenting judge also explained that the majority misapplied its own exception. Judge Agee reasoned that Maryland's straightforward administrative remedy process was not confusing and, in any event, Mr. Blake could not have "reasonably interpreted procedures that were available to him but that

he never bothered to read." Pet. App. 20. Judge Agee also observed that "prisoner grievance proceedings and internal investigations serve different and not entirely consistent purposes." Pet. App. 19-20. Finally, Judge Agee warned that, if the majority's decision is allowed to stand, prison officials will have to "anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." Pet. App. 26.

SUMMARY OF ARGUMENT

1. In enacting the PLRA, Congress sought to reduce the volume of meritless prisoner lawsuits overwhelming the federal judiciary, *Porter*, 534 U.S. at 524, and to reduce federal court interference into the States' administration of prisons, *Woodford*, 548 U.S. at 93. A "centerpiece" of this effort was the creation of an "invigorated" exhaustion requirement. *Porter*, 534 U.S. at 529. That requirement dictates in clear and unambiguous terms that "[n]o action shall be brought with respect to prison conditions by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). As this Court has held, the plain language of the PLRA makes the exhaustion requirement mandatory, *Porter*, 534 U.S. at 529, and requires the "proper exhaustion" of all remedies that are "available," *Woodford*, 548 U.S. at 93.

In this case, notwithstanding this Court's prohibition against reading "exceptions into statutory exhaustion requirements where Congress has provided otherwise," *Booth*, 532 U.S. at 741 n.6, the Fourth Circuit joined the Second Circuit in recognizing a judicially-crafted "reasonable belief" exception to the PLRA's exhaustion requirement. This exception, however, has no basis in the unambiguous statutory text, pursuant to which this Court consistently has refused to approve judicially-crafted exceptions. *See Booth*, 532 U.S. at 741 n.6; *Woodford*, 548 U.S. at 91 n.2. In holding that the PLRA requires "proper exhaustion," *Woodford*, 548 U.S. at 93, including completion of "all steps that the agency holds out," *id.* at 90, this Court rejected the possibility that exhaustion could be satisfied without compliance with such remedies as are available to a prisoner. The Fourth Circuit's reasonable belief exception directly conflicts with the PLRA as construed by this Court, because it excuses a prisoner's complete failure to make use of an available remedy based solely on the prisoner's misunderstanding.

This case presents no basis for departing from this Court's practice in declining to read extra-textual exceptions into unambiguous statutory exhaustion requirements "by way of creation." *Jones v. Bock*, 549 U.S. 199, 216 (2007). "Where Congress specifically mandates, exhaustion is required." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Congress made exhaustion of administrative remedies mandatory and placed only one limitation on a prisoner's obligation

to exhaust: that the remedies be "available." 42 U.S.C. § 1997e(a). Under these circumstances, "additional exceptions are not to be implied." *TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The Fourth Circuit violated these settled principles of statutory interpretation in adopting its reasonable belief exception to excuse exhaustion of an available remedy.

2. The Fourth Circuit's judicially-crafted exception also conflicts with both the history of the PLRA and the statute's broader purposes. Congress enacted the PLRA's mandatory, proper exhaustion requirement to replace a prior, ineffective exhaustion provision that had permitted district courts to require exhaustion only if they concluded that doing so would be in the "interests of justice" and that the remedies at issue were "plain, speedy, and effective." *Compare* 42 U.S.C. § 1997e(a)(1) (1994) *with* Pub. L. No. 104-134, § 101, 110 Stat. 1321, codified at 42 U.S.C. § 1997e(a) (1996). In making these changes, Congress explicitly "eliminated" judicial discretion to dispense with exhaustion. *Booth*, 532 U.S. at 739. A reasonable belief exception effectively restores to the courts the discretion to excuse noncompliance with the exhaustion of administrative remedies, discretion that Congress unambiguously intended to remove. Because the federal courts may not deprive a congressional amendment of substantial effect, this exception must be rejected. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995).

Moreover, the Fourth Circuit's broad exception undermines the purposes of the PLRA. The exception inevitably will result in more lawsuits being filed without affording the opportunity to resolve the complaints internally through the prison's grievance system, and will embroil federal courts in the nuances of a prison's grievance systems to determine the reasonableness of a prisoner's belief as to whether he had exhausted his remedies.

3. The Fourth Circuit justified its reasonable belief exception by asserting that it could import into the PLRA traditional exceptions to judicially-crafted administrative exhaustion requirements. Pet. App. 9-10. However, even if the Fourth Circuit were correct, which it is not, "reasonable belief" was not such a traditional exception. This Court has recognized only three sets of traditional exceptions to administrative exhaustion: (1) where requiring an inmate to follow the administrative process would cause irreparable harm, (2) where exhaustion would be futile or the agency lacks any power to grant effective relief, and (3) where the agency is biased. None of these incorporates or justifies a "reasonable belief" exception. The prisoner's state of mind is irrelevant to all of these exceptions.

4. Finally, even if the Fourth Circuit were correct that a judge-made reasonable belief exception may be read into the PLRA, it misapplied that exception here. Mr. Blake could not have "reasonably interpreted" Maryland's grievance procedures, Pet. App. 15, because he "never bothered to read [them],"

Pet. App. 20. Had he done so, it would have been apparent that the prison's administrative remedy procedure was available for "all" types of complaints and contained only four exceptions, none of which applied here. Pet. App. 77-78; J.A. 312. Moreover, the internal investigation into Lt. Madigan's use of force could not have served the same substantive purposes as the exhaustion of administrative remedies because administrative remedy proceedings and internal investigations serve different goals.

Because the PLRA mandates that a prisoner exhaust available administrative remedies before bringing suit, and it is undisputed that Mr. Blake failed to file a grievance under the prison's available administrative remedy procedure, the decision of the court of appeals should be reversed.

ARGUMENT

Congress's primary purpose in enacting the PLRA's mandatory exhaustion requirement was to reduce the volume of meritless prisoner lawsuits overwhelming the federal judiciary. *Porter*, 534 U.S. at 524. "What this country needs, Congress decided, is fewer and better prisoner suits." *Jones*, 549 U.S. at 203. The Fourth Circuit's judicially-created "reasonable belief" exception functionally eviscerates this "centerpiece" of the PLRA, *Woodford*, 548 U.S. at 84, by once again making discretionary the requirement that a prisoner exhaust all available administrative

remedies before filing suit with respect to prison conditions. Contrary to the PLRA's plain meaning and congressional purpose, the "reasonable belief" exception improperly allows a district court to dispense with the PLRA's mandatory exhaustion of administrative remedies. There is no basis in either the statute or this Court's precedents for this broad exception to the PLRA's congressionally-imposed mandate that prisoners exhaust available administrative remedies before bringing suit.

I. The Plain Text of the PLRA Does Not Support a Reasonable Belief Exception, and There Is No Basis for Reading an Extra-Textual Exception into the Statute.

1. The PLRA mandates in clear and unambiguous terms that "[n]o action shall be brought with respect to prison conditions by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). As this Court explained when construing a related provision of the PLRA, "[t]he mandatory 'shall' normally creates an obligation impervious to judicial discretion." *Miller v. French*, 530 U.S. 327, 337 (2000) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). The language of the PLRA thus does not admit of a reasonable belief exception or, for that matter, any other judicially-created exceptions. To comply with the statute, if administrative remedies are available, a prisoner must exhaust them. *See*

id. (refusing to adopt an interpretation that "would subvert the plain meaning of the statute, making its mandatory language merely permissive").

Presuming as it must that Congress "says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), this Court has emphasized repeatedly that the PLRA's exhaustion requirement is "mandatory." *Jones*, 549 U.S. at 211; *Woodford*, 548 U.S. at 85; *Porter*, 534 U.S. at 524. The mandatory nature of the requirement is incompatible with the notion that courts might allow exceptions that are unstated in the statute. After all, "[m]andatory exhaustion is not satisfied by a judicial conclusion that the requirement need not apply." *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998).

The Fourth Circuit's "reasonable belief" exception is not grounded in statutory text; it is instead a judicially-crafted addition purportedly drawn from administrative law. By manufacturing an exception in this way, the court of appeals has done precisely what this Court has declared that it "will not" do, which is "read exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth*, 532 U.S. at 741 n.6. Refusal to depart from the congressional mandate has been this Court's consistent response when asked to approve judicially-crafted exceptions to the PLRA's mandatory exhaustion requirement. *See id.*; *Woodford*, 548 U.S. at 91 n.2.

Thus, in *Booth*, this Court declined to import into the PLRA's exhaustion requirement a futility exception drawn from administrative law. 532 U.S. at 741 n.6. The inmate in *Booth* argued that where the relief he sought in the court system was not available through the administrative process, the traditional futility exception should have excused any need to exhaust. *Id.* In rejecting that argument, this Court explained that because the PLRA's exhaustion mandate came from Congress, not the judiciary, judges could "not read futility or other exceptions into" the PLRA. *Id.* at 741 & n.6. Instead, "the inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues." *Id.* at 741 n.6.

A few years later, this Court in *Woodford* refused to engraft onto the PLRA's exhaustion requirement a traditional judge-made exception to administrative exhaustion that permits individuals to raise constitutional claims in federal court even if they have failed to raise those claims properly before the agency. 548 U.S. at 91 n.2; *see id.* at 114 (Stevens, J., dissenting) (discussing exception). The Court emphasized that PLRA exhaustion is "a statutory requirement," not a judge-made doctrine, and that the proposed exception would not serve the statutory purpose of reducing the "flood of prisoner litigation in the federal courts." *Id.* at 91 n.2. Thus, even with respect to constitutional claims, the PLRA requires "proper exhaustion," meaning that an inmate must complete "all steps that the agency holds out, and do[ ] so *properly*," by

complying in full with all of the procedural rules governing the grievance process. *Id.* at 88, 90 (emphasis in original; internal quotation omitted).

The Fourth Circuit's reasonable belief exception directly conflicts with this Court's decision in *Woodford*. In determining that the PLRA's "proper exhaustion" requirement could not be satisfied by "filing an untimely or otherwise procedurally defective administrative grievance or appeal," 548 U.S. at 83-84, *Woodford* necessarily rejected the notion that incomplete or merely substantial compliance with administrative procedures would suffice. However, as recognized by the dissenting judge below, the Fourth Circuit's reasonable belief exception is "substantial compliance by another name." Pet. App. 21. Indeed, a reasonable belief exception is even more permissive than the exceptions this Court rejected in *Woodford*: Mr. Blake's grievance was not merely untimely or procedurally defective; it was non-existent. If the PLRA precludes a complaint where the underlying administrative claim was merely procedurally defective, it must be equally preclusive where the underlying administrative claim was never made.

2. This case presents no reason to deviate from this Court's consistent practice of refusing to read extra-textual exceptions from administrative law into the unambiguous language of the PLRA "by way of creation." *Jones*, 549 U.S. at 216 (internal quotation omitted). Although a judicially-created exhaustion requirement is naturally subject to judicially-created exceptions, a federal court's power to excuse

compliance with a statutory exhaustion requirement is far more limited.

"Whatever may be the scope allowed generally" for exceptions to exhaustion "where no explicit congressional command exists the problem when such a mandate is present is entirely different from one tendered in its absence." *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 774-75 (1947). "Congress," not the courts, "is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," *Patsy*, 457 U.S. at 501, and "[a]ppropriate deference to Congress' power requires fashioning of exhaustion principles in a manner consistent with congressional intent and [the] applicable statutory scheme," *McCarthy*, 503 U.S. at 144.

Under this established principle, where Congress has not spoken, "sound judicial discretion governs," but "[w]here Congress specifically mandates, exhaustion is required." *Id.* Therefore, if Congress expressly requires exhaustion, this Court typically will not engraft judicially-created exceptions onto the statute. *See, e.g.*, *Booth*, 532 U.S. at 741 n.6; *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000); *McNeil v. United States*, 508 U.S. 106, 111 (1993); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975); *see also Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26-27 (1989) (refusing to read exceptions into a "mandatory" notice provision). This reticence follows from the general principle that federal courts "are not free to rewrite the statutory text," *McNeil*, 508 U.S. at 111,

nor are they "at liberty to create an exception where Congress has declined to do so," *Hallstrom*, 493 U.S. at 27.

In *Salfi*, for example, this Court held that a statutory exhaustion requirement in the Social Security Act "may not be dispensed with merely by a judicial conclusion of futility." 422 U.S. at 766. The statute, which expressly made judicial review available only after a "final" agency decision, was "something more than simply a codification of the judicially developed doctrine of exhaustion." *Id.* A nearly-identical exhaustion requirement was similarly deemed in *Shalala* to preclude courts from applying "case by case" exceptions from administrative law. 529 U.S. at 13.

Although some decisions applying this principle of construction outside the PLRA context involved jurisdictional exhaustion requirements, *see Salfi*, 422 U.S. at 766, the Court's insistence on avoiding judicial amendment of statutory exhaustion provisions has not been limited solely to requirements deemed jurisdictional. As the Court has repeatedly emphasized, a requirement can still be mandatory, and thus not subject to exceptions, even if it is not jurisdictional. That is, "calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored." *Gonzalez v. Thaler*, 565 U.S. ___, 132 S. Ct. 641, 651 (2012); *see also Greenlaw v. United States*, 554 U.S. 237, 245 (2008) (explaining that "a rule can be inflexible without being jurisdictional" and holding that cross-appeal rule is not subject to

exceptions without deciding whether the rule is jurisdictional); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (holding time limit for filing a motion for a new trial is not jurisdictional but is still "inflexible"); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (noting "difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule").

This type of "mandatory," statutorily-imposed prerequisite to suit cannot be excused by the federal courts regardless of whether the requirement is "jurisdictional in the strict sense of the term." *Hallstrom*, 493 U.S. at 26, 31 (holding that a mandatory notice requirement was not subject to exception without deciding whether the requirement was jurisdictional). Such a requirement remains "a congressionally established exhaustion imperative, not a judicially created one, and accordingly the courts lack discretion to waive it." *Hoogerheide v. I.R.S.*, 637 F.3d 634, 639 (6th Cir. 2011) (Sutton, J.); *see also Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (holding that, although not jurisdictional, the PLRA's exhaustion requirement is mandatory and courts cannot "engraft exceptions"); *Nyhuis v. Reno*, 204 F.3d 65, 69 n.4, 78 (3d Cir. 2000) (although exhaustion provision is not jurisdictional, it is mandatory and not subject to judicially-created exceptions).

It is not the role of federal courts "to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983," *Patsy*, 457 U.S. at 512, nor to second-guess that balance by creating judge-made exceptions to mandatory

exhaustion requirements. Rather, as this Court has repeatedly explained, "[s]trict adherence to the procedural requirements specified by Congress is the best guarantee of evenhanded administration of the law." *McNeil*, 508 U.S. at 113 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Although the benefits of mandatory exhaustion might come at the "price" of "occasional hardship" for plaintiffs, this "was the judgment of Congress." *Shalala*, 529 U.S. at 13.

In this case, the Fourth Circuit violated these precepts of statutory interpretation by reading a judicially-created exception into the PLRA's statutory exhaustion requirement. This it cannot do, because "Congress has provided otherwise." *Booth*, 532 U.S. at 741 n.6. The majority of courts of appeals to address the issue have held that it is beyond a judge's discretion to excuse noncompliance with the PLRA's exhaustion requirement.[8]

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[8] *See, e.g.*, *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam) (overruling a prior decision that had given district courts wide discretion to excuse the PLRA's exhaustion requirement); *Chelette*, 229 F.3d at 688 (holding that "we are not free to engraft upon the statute an exception that Congress did not place there" (internal quotation omitted)); *Nyhuis*, 204 F.3d at 73 ("[I]t is beyond the power of this court – or any other – to excuse compliance with the [PLRA's] exhaustion requirement on the ground of futility, inadequacy, or any other basis." (internal quotation omitted)); *Alexander*, 159 F.3d at 1325-26 ("Since exhaustion is now a pre-condition to suit, the courts cannot simply waive those requirements where they determine they are futile or inadequate.").

3. The sole limitation Congress placed on a prisoner's obligation to exhaust administrative remedies is that the remedies must be "available." 42 U.S.C. § 1997e(a). Thus, to determine whether a particular administrative remedy must be exhausted, Congress directed courts to "focus solely" on whether that remedy is available. *Alexander*, 159 F.3d at 1326. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW*, 534 U.S. at 28 (quoting *Andrus*, 446 U.S. at 616-17).

It is beyond reasonable dispute that the administrative remedy process was available to Mr. Blake. This Court has construed the term to mean that a remedy is "available" if the prison's "administrative process [has] authority to take some action in response to a complaint," even if it cannot provide "the remedial action an inmate demands." *Booth*, 532 U.S. at 736. So defined, the term "available" does not contain a subjective element that would hinge on the inmate's belief as to the existence, accessibility, or necessity of compliance with such remedy. Instead, the remedy's existence is a matter of objective fact, its accessibility can be readily determined, and the necessity of compliance is governed by the unambiguous command of Congress. *See Nyhuis*, 204 F.3d at 73 (By using the word available, "Congress merely meant to convey that if a prison provided no internal remedies, exhaustion would not be required.").

Under the plain language of the statute, a prisoner's misunderstanding of the prison's grievance process – reasonable or otherwise – cannot render the process unavailable. Although some courts of appeals have held that an administrative remedy is effectively unavailable when interference by prison officials prevents an inmate from using it,[9] none have found that an inmate's mere misunderstanding somehow renders the process unavailable.

In this case, the Fourth Circuit did not suggest that the prison's administrative remedy procedure was not available to Mr. Blake. To the contrary, the panel majority consciously crafted the reasonable belief exception as a way of justifying Mr. Blake's failure to use a process that clearly *was* available. The prison laid out, in both the handbook and directives, which types of complaints were covered – and which were not covered – by the grievance process. Pet. App. 77-78; J.A. 312. The prison provided the

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[9] *See, e.g.*, *DeBrew v. Atwood*, 792 F.3d 118, 128 (D.C. Cir. 2015) (prison officials refused to provide necessary documents); *Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) (prison staff mistakenly told inmate that process did not have a second step); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (warden sent inmate on "wild goose chase" by referring him to wrong regulation); *Tuckel v. Grover*, 660 F.3d 1249, 1252 (10th Cir. 2011) (officers threatened and intimidated inmate into failing to submit grievance); *Kaba v. Stepp*, 458 F.3d 678, 685-86 (7th Cir. 2006) (prison refused to provide inmate grievance forms); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (refused to provide forms); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (refused to provide forms).

handbook to Mr. Blake and made the full directives available in the library. Pet. App. 76, 78. The prison even offered an orientation session and an administrative remedy coordinator to answer questions. Pet. App. 74-75, 78. This was far from a case of a prison deliberately creating byzantine "procedural requirements for the purpose of tripping up all but the most skillful prisoners." *Woodford*, 548 U.S. at 102 (declining to decide whether even such byzantine requirements would make a remedy unavailable under the PLRA).

Mr. Blake failed to read the directives, ask for assistance, or otherwise attempt to understand the administrative remedy process. As Judge Agee pointed out in dissent, it is telling that Mr. Blake did not believe he was "precluded" from using the administrative grievance process; he merely assumed that it was "unnecessary" for him to do so. Pet. App. 25 (emphasis omitted); *see* J.A. 173-74. Mr. Blake's mistaken assumption does not, and cannot, render Maryland's grievance process unavailable.

II. The Judicially-Crafted Reasonable Belief Exception Is Inconsistent with the Statutory History and Purpose of the PLRA.

The Fourth Circuit's "reasonable belief" exception to the PLRA's exhaustion requirement not only offends the plain language of the statute, but it is inconsistent with both the history of the PLRA's

exhaustion provision and with the broader purposes of the PLRA itself.

1. The "statutory history" of the PLRA's exhaustion provision "confirms" what "Congress meant" when it mandated exhaustion. *Booth*, 532 U.S. at 739; *see Hallstrom*, 493 U.S. at 28 (finding "[n]othing in the legislative history" that would "militate[ ] against honoring the plain language of the [statutory] notice requirement"). Congress enacted the PLRA's exhaustion requirement with the purpose of reducing the volume of meritless prisoner lawsuits, *Porter*, 534 U.S. at 524, and achieving "fewer and better prisoner suits," *Jones*, 549 U.S. at 203; *see Bruce v. Samuels*, ___ U.S. ___, No. 14-844, 2016 WL 112684, at *3 (Jan. 12, 2016) (explaining that Congress intended the PLRA to "filter out the bad claims [filed by prisoners] and facilitate consideration of the good") (quoting *Coleman v. Tollefson*, 575 U.S. ___, 135 S. Ct. 1759, 1762 (2015)).

To further this purpose, Congress mandated that state and federal prisoners exhaust all available administrative remedies before bringing suit with respect to conditions of confinement. *See* 141 Cong. Rec. S7526 (daily ed. May 25, 1995) (remarks of Sen. Kyl) (stating that exhaustion of administrative remedies would be required), *reprinted in* Reems & Manz, at doc. 8. In doing so, Congress changed prior law in three significant ways: (1) it made administrative exhaustion a prerequisite to filing suit, not simply a basis for granting a temporary stay of litigation; (2) it eliminated the prior CRIPA requirement that judges

conduct an *ad hoc* "interests of justice" analysis to determine whether to require exhaustion; and (3) it deleted the requirement that administrative remedies be "plain, speedy, and effective," before exhaustion could be mandated. *Booth*, 532 U.S. at 739. *Compare* 42 U.S.C. § 1997e(a)(1) (1994) *with*, Pub. L. No. 104-134, § 101, 110 Stat. 1321, codified at 42 U.S.C. § 1997e(a) (1996).

These changes leave no doubt that Congress intended to eliminate the prior judicial discretion to dispense with exhaustion in prisoner suits. *See Booth*, 532 U.S. at 539-41; 141 Cong. Rec. H14098 (daily ed. Dec. 6, 1995) (remarks of Rep. LoBiondo), *reprinted in* Reems & Manz, at doc. 18. The PLRA expressly eliminated the ability of courts to make decisions regarding whether exhausting administrative remedies was justified in any particular case, as well as whether the available administrative remedies were worth exhausting.

The Fourth Circuit's *ad hoc* reasonable belief exception improperly restores to courts a significant amount of the discretion expressly removed by Congress when it eliminated the authority for judges to decide whether exhaustion was in the "interests of justice." Reading such an exception into the statute now would be "highly anomalous given Congress's elimination of judicial discretion to dispense with exhaustion." *Porter*, 534 U.S. at 529. After all, when Congress amends a statute, courts must presume that Congress "intend[ed] its amendment to have real and substantial effect." *Stone*, 514 U.S. at 397; *see*

Nyhuis, 204 F.3d at 72 (interpreting PLRA's amendments to exhaustion requirements to have "real and substantial effect" (quoting *Stone*)). The Fourth Circuit's reasonable belief exception is effectively a new type of *ad hoc* "interests of justice" exception, and it would thus deprive Congress's amendment of substantial effect.

In addition, the Fourth Circuit's attempt to justify its reasonable belief exception by calling Maryland's administrative procedures "murky," Pet. App. 15, conflicts with Congress's decision to remove the former requirement that a particular remedy be "plain, speedy, and effective." By removing this language, Congress made clear that courts were not to scrutinize the adequacy of a prison's administrative remedy process to determine whether it met a particular standard of clarity, timeliness, and effectiveness. *See Nyhuis*, 204 F.3d at 74 (stating that in amending § 1997e(a), "Congress intended to save courts from spending countless hours educating themselves in every case as to the vagaries of prison administrative processes, state or federal.").

As this Court observed in *Booth*, when Congress deleted the "plain, speedy, and effective" standard and "the requirement that administrative procedures must satisfy certain 'minimum acceptable standards' of fairness and effectiveness," Congress made a deliberate choice to dispense with those requirements. *Booth*, 532 U.S. at 740 & n.5; *see also Alexander*, 159 F.3d at 1326 (stating that removal of the qualifiers "plain, speedy, and effective" indicated that "Congress

no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is 'available' in the prison involved"). These alterations in the statutory text indicate that "Congress has mandated exhaustion," *Booth*, 532 U.S. at 740, regardless of the clarity, speed, or effectiveness of the grievance process.

2. The Fourth Circuit's judicially-crafted exception is also inconsistent with the two primary purposes of the PLRA, which were: (1) to relieve courts of litigation burden by reducing the quantity of meritless suits, *see Porter*, 534 U.S. at 524-25, and (2) to return prison administration to the prisons, rather than the courts, *Woodford*, 548 U.S. at 93 ("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." (footnote omitted)). *See also* 141 Cong. Rec. H14098 (daily ed. Dec. 6, 1995) (remarks of Rep. LoBiondo) (explaining that by requiring exhaustion "we will reduce the intrusion of the courts into the administration of the prisons"), *reprinted in* Reems & Manz, at doc. 18; 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (remarks of Sen. Hatch) ("We believe that it is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as

well as the legitimate needs of prisoners."), *reprinted in* Reems & Manz, at doc. 12.

One can scarcely imagine a proposition more likely to frustrate the first of these congressional purposes than the Fourth Circuit's amorphous and all-too-easily satisfied reasonable belief exception. It inevitably will result in more lawsuits being filed without affording prison administrators any opportunity to resolve the complaints through the internal mechanisms designed for that purpose.[10] When a court creates an exception to exhaustion, it also creates "a continuing invitation to litigation." Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 1006 (1939); *see also* Marcia R. Gelpe,

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[10] Before the Second Circuit recognized a similar exception in *Giano* in 2004, the number of prisoner suits filed in district courts in that circuit was declining, from 1,865 in 2000 to 1,372 in 2004. *See* United States Courts, Statistics & Reports, Table C-3, U.S. District Courts Judicial Business Tables (Sept. 30, 2000 & Sept. 30, 2004). Within two years following the decision in *Giano*, that trend reversed, ultimately rising to 2,078 in 2012, an increase of more than 50% above the number of suits recorded in 2004. *Id.*, Table C-3 (Sept. 30, 2012). With the exception of an aberration in 2014, the number of prisoner suits within the Second Circuit through 2015 has remained steady. *See id.*, Table C-3 (Sept. 30, 2004 – Sept. 30, 2015). In contrast, the number of filings nationally in the year 2000 was 25,504, decreasing to 23,499 in 2004, and remaining fairly steady through 2012, when there were 25,036 such filings, an increase of less than 7% since 2004. United States Courts, Statistics & Reports, Table C-2, U.S. District Courts Judicial Business Tables (Sept. 30, 2000 – Sept. 30, 2015). The number of filings in 2015 was 26,519. *Id.*, Table C-2 (Sept. 30, 2015).

Exhaustion of Administrative Remedies: Lessons from Environmental Cases, 53 Geo. Wash. L. Rev. 1, 27 (1984). Conversely, as this Court has observed, a simple rule without exceptions "avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [a] suggested exception." *McCarthy v. Bronson*, 500 U.S. 136, 143 (1991).

The PLRA's exhaustion requirement specifically furthers the congressional purpose of reducing the quantity of meritless prisoner suits in three ways: First, "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Porter*, 534 U.S. at 525 (citing *Booth*, 532 U.S. at 737). Second, "the internal review might 'filter out some frivolous claims.'" *Id.* (quoting *Booth*, 532 U.S. at 737). Finally, "for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Id.* (citing *Booth*, 532 U.S. at 737); *see also Woodford*, 548 U.S. at 94.

The Fourth Circuit's exception undermines all of these advantages that Congress sought to achieve. By allowing exhaustion to be bypassed without pursuing the administrative route specifically designed to resolve grievances, the exception decreases the possibility that claims will be resolved short of litigation and also decreases the ability of the prisons to weed out frivolous claims. Similarly, by allowing exhaustion to be bypassed in favor of a different process that serves a different end, the Fourth Circuit's exception

is unlikely to result in the creation of an administrative record that will be as effective in clarifying the contours of the controversy.

The Fourth Circuit's application of the exception in this case is instructive. The court allowed Mr. Blake to bypass the administrative procedure designed to hear and resolve inmate complaints; it deemed him to have "substantively" exhausted available remedies on the ground that prison authorities, acting on their own initiative, undertook a separate procedure designed for the entirely separate purpose of investigating an officer's misconduct so that the appropriate state officials could determine whether to impose discipline or refer the matter for criminal prosecution. Under the logic of the Fourth Circuit's decision, which *assumes* that the prisoner read and was confused by the applicable guidance documents even when the evidence is to the contrary, Pet. App. 12 n.4, a prisoner who merely becomes aware that the prison is conducting an internal investigation can always proceed to court without exhausting administrative remedies.

This broad exception would eviscerate the PLRA's mandatory exhaustion requirement. As this Court has explained, "[t]he benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance," and "[t]he prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules." *Woodford*, 548 U.S. at 95. If an inmate can satisfy the exhaustion requirement

even when bypassing it completely, the grievant will have little incentive to comply and a significant incentive to claim that he was confused. It is "highly implausible" that Congress intended to provide prisoners such a "strong inducement to skip the administrative process." *Booth*, 532 U.S. at 741.

The Fourth Circuit's exception is also inconsistent with Congress's second purpose in enacting the PLRA, namely, removing courts from involvement in the day-to-day operations of prisons. Contrary to that goal, a reasonable belief exception will embroil federal courts in the nuances of a prison's grievance system to determine whether it was reasonable for a prisoner to believe he had exhausted his remedies. That level of involvement in reviewing a prison's internal policies is particularly inappropriate in light of this Court's oft-repeated warnings against excessive interference by the federal courts in prison operations. *See, e.g.*, *Florence v. Board of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. ___, 132 S. Ct. 1510, 1515-16 (2012) (generally discussing "the importance of deference to correctional officials" owed by courts); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.").

As Judge Agee recognized, the Fourth Circuit's rule would also require prison officials to "anticipate every potential misunderstanding that an inmate might have" and foreclose those misunderstandings

in writing. Pet. App. 26. That necessity would not only impose a "substantial new burden on state correctional officials," but might also compel those officials to adopt "overly complicated administrative procedures" that could "in turn produce even more confusion among prisoners." Pet. App. 26. Otherwise, exhaustion would be excused anytime prison regulations are not so detailed as to specifically negate any conceivable basis for confusion, even where the inmate has made no attempt to understand the process. This cannot be what Congress intended.

Consistent with the concerns expressed by Judge Agee, this Court has rejected arguments that exhaustion should depend on a parsing of the remedies available through the administrative process, *Booth*, 532 U.S. at 741, or a review of whether a prisoner substantially complied with an administrative process despite defaulting on procedural requirements, *Woodford*, 845 U.S. at 90-94. "Since the internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems." *Porter*, 534 U.S. at 531 (quoting *Preiser*, 411 U.S. at 492). There is no justification for permitting inmates to bypass prison grievance procedures merely because the inmate misunderstood them.

III. "Reasonable Belief" Is Not a Traditional Exception to Administrative Exhaustion.

Even if the Fourth Circuit were correct that Congress had intended to import traditional, judge-made exceptions from administrative law into the PLRA's exhaustion requirement, such an intent would not authorize the reasonable belief exception adopted by the Fourth Circuit because there was no such common-law exception to be imported. This Court has recognized only three sets of traditional exceptions to administrative exhaustion: (1) where "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action," *McCarthy*, 503 U.S. at 146-47; (2) where there is "some doubt as to whether the agency was empowered to grant effective relief," *id.* at 147 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)); and (3) "where the administrative body is shown to be biased or has otherwise predetermined the issue before it," *id.* at 148. None of these incorporates or justifies a "reasonable belief" exception.

The first of these exceptions is sometimes referred to as the "hardship" exception. *See Shalala*, 529 U.S. at 13 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). This exception applies to situations in which the administrative process might take an unreasonable or indefinite period of time, *see, e.g.*, *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989) (plaintiff not required to exhaust where there was no reasonable time limit on consideration of administrative

claims); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966) (possible delay of 10 years in considering administrative claim rendered exhaustion unnecessary), or where enforcement of an exhaustion requirement would cause irreparable harm or preclude a defense to criminal liability, *see, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 483 (1986); *Hirsch*, 331 U.S. at 773 (allowing consideration of "impending irreparable injury flowing from delay" in administrative procedure in determining whether exhaustion is required); *McKart v. United States*, 395 U.S. 185, 197 (1969) (use of the exhaustion doctrine in criminal cases can be "exceedingly harsh," thus requiring a governmental interest sufficient to outweigh the "severe burden" imposed on the defendant).

Second, this Court has recognized an exception to judge-made exhaustion for futility where the agency lacks power to provide relief. *See McCarthy*, 503 U.S. at 147 Under this exception, a plaintiff's failure to raise constitutional claims before an administrative body that is not competent to resolve them will not necessarily preclude him from raising those claims in subsequent court proceedings. *See, e.g.*, *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 406-07 (1988) (not requiring submission of regulatory challenge to fiscal intermediary who lacked authority to deviate from the applicable rules and regulations); *Moore v. City of East Cleveland*, 431 U.S. 494, 497 n.5 (1977); *McNeese v. Board of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963) (students were not required to file complaint with school superintendent

who had "no power to order corrective action"). As discussed above, this Court has already rejected the notion of incorporating into the PLRA this traditional exception to judicially-prescribed exhaustion. *Booth*, 532 U.S. at 741 n.6.

Third, this Court has recognized a traditional exception to judicially-mandated administrative exhaustion where the administrative body has a demonstrated bias or has "predetermined the issue before it." *McCarthy*, 503 U.S. at 148; *see also, e.g.*, *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (requiring exhaustion when the final agency decision-maker had already reached determination on merits "would be to demand a futile act"); *Association of Nat'l Advertisers, Inc. v. Federal Trade Comm'n*, 627 F.2d 1151, 1156-57 (D.C. Cir. 1979) (considering dispute regarding bias of FTC Chairman notwithstanding failure to exhaust administrative remedies).

For each of these exceptions, state of mind is irrelevant. Instead, the focus of the first exception is on the objective hardship caused by requiring compliance with the administrative procedure, and the focus of the second and third exceptions is on the competence, authority, or bias of the administrative body itself. The leading treatises on administrative law have similarly identified exceptions to judge-made exhaustion requirements that focus on irreparable harm or the administrative body itself, but no recognized exception depends on a claimant's beliefs as to whether he or she had exhausted. *See, e.g.*, 33 Charles Alan Wright & Charles H. Koch, Jr., *Federal*

Practice & Procedure, Judicial Review of Administrative Action § 8398, at 404-11 (1st ed. 2006); 2 Richard J. Pierce, *Administrative Law Treatise*, § 15.2, at 1222-30 (4th ed. 2002).

The Fourth Circuit did not rely on any authority identifying reasonable belief as a traditional exception to administrative exhaustion. Instead, the Fourth Circuit relied only on the Second Circuit's decision in *Giano* and Justice Breyer's concurring opinion in *Woodford*, in which he both cited *Giano* and, separately, suggested that the PLRA might incorporate traditional exceptions to administrative exhaustion. Pet. App. 9-10 (citing *Giano*, 300 F.3d at 676 and *Woodford*, 548 U.S. at 103-04 (Breyer, J., concurring)).

However, Justice Breyer's list of traditional exceptions to administrative exhaustion included only the recognized exceptions for constitutional claims, futility, hardship, and inadequate or unavailable administrative remedies. *Woodford*, 548 U.S. at 103 (Breyer, J., concurring). Although Justice Breyer cited *Giano*, it was for the limited proposition that "the PLRA's proper exhaustion requirement is not absolute." *Id.* at 104. Justice Breyer thus did not endorse *Giano*'s reasonable belief exception; to the contrary, his concurrence suggested that the lower court on remand consider only whether the case "falls into a *traditional* exception that the statute implicitly incorporates." *Id.* (emphasis added).

Giano also does not demonstrate that "reasonable belief" is a traditional exception to administrative exhaustion. Although the Second Circuit cited circuit court cases, including contemporaneously decided companion cases, for the general proposition that the PLRA's exhaustion requirement is not absolute, the court did not cite a single authority identifying the reasonable belief exception as a traditional exception to administrative exhaustion. *See Giano*, 380 F.3d at 678-79. Thus, even if Congress had intended to import into the PLRA traditional exceptions to judge-made administrative exhaustion requirements, that would not justify the Fourth Circuit's reasonable belief exception.

IV. Even If the Fourth Circuit Were Correct That a Reasonable Belief Exception Should Be Read into the PLRA, the Court of Appeals Misapplied That Exception.

Even if a judge-made reasonable belief exception could be read into the PLRA, the court of appeals erred in its application of the exception. In the court's view (1) Mr. Blake reasonably believed that he had exhausted his remedies by participating in an internal affairs investigation and (2) the investigation served the same substantive purposes as the administrative grievance process. Pet. App. 11-15. But the Fourth Circuit was wrong on both counts.

1. As an initial matter, Mr. Blake could not have "reasonably interpreted" Maryland's grievance

procedures, Pet. App. 15, because he "never bothered to read [them]," Pet. App. 20. The Fourth Circuit's decision bypasses these inconvenient facts by "assum[ing] that the inmate possessed all available relevant information," and concluding that a prisoner who reviewed all of that information might reasonably have been confused by it. Pet. App. 12-14 & n.4. Thus, the court of appeals determined that it was reasonable for Mr. Blake to believe that he had exhausted administrative remedies based on the majority's consideration of readily-available information that Mr. Blake admittedly did not review and on which he did not rely.

By contrast, it was undisputed in *Giano* that the inmate actually read the rules and regulations at issue. 380 F.3d at 676 ("[T]he plaintiff reasonably interpreted DOCS regulations to mean that his only administrative recourse was to appeal his disciplinary conviction."); *id.* at 678 ("The defendants argue that Giano misread DOCS regulations."). Having failed even to read or consider the applicable materials, Mr. Blake's belief that he had exhausted administrative remedies could not have been reasonable. For that reason alone, the court of appeals must be reversed.

Moreover, had Mr. Blake actually reviewed the applicable materials or taken any steps to try to understand the process, he would have quickly learned that it was available for "all" types of complaints, expressly including complaints involving the "use of force." Pet. App. 77-78; J.A. 312. He also would

have gleaned from the materials that the ARP procedure was subject to only four exceptions, none of which had anything to do with the existence of an IIU investigation. Pet. App. 77-78; J.A. 312. The court of appeals nevertheless deemed these procedures to be ambiguous merely because they did not explicitly rule out the possibility that the existence of an IIU investigation might preclude using the prison's administrative remedy process. Pet. App. 12-14.

However, nothing about the mutual existence of two different sets of procedures serving different purposes and established and described in different documents should be expected to give rise to a presumption that the existence of one would preclude use of the other. Contrary to the Fourth Circuit's approach, "a jail's grievance policies need not explicitly provide for all possible scenarios in which a prisoner may seek to file a grievance." *Napier v. Laurel Cnty.*, 636 F.3d 218, 223 (6th Cir. 2011).

Having made the counterfactual assumption that Mr. Blake reviewed the materials available to him, and having erroneously found those materials wanting, the court of appeals then placed the burden on Lt. Ross to disprove that the grievance process was ambiguous and to disprove the reasonableness of Mr. Blake's purported interpretation. Pet. App. 14. As this Court has made clear, however, the burden to prove an exception to exhaustion rests with the party seeking to bypass the requirement. *See Honig v. Doe*, 484 U.S. 305, 327 (1988); *see also Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015)

(placing the burden on inmate to prove that he should be excused from exhaustion under the PLRA). Mr. Blake failed to prove that Maryland's procedures were ambiguous or that he had any reasonable belief that he had complied with those procedures, and the Fourth Circuit should not have excused him from the exhaustion requirement.

2. With respect to the second prong of the Fourth Circuit's test, the internal investigation into Lt. Madigan's conduct did not serve, and could not have served, the same substantive purposes as the exhaustion of administrative remedies. As three courts of appeals have held, "prisoner grievance proceedings and internal investigations serve different and not entirely consistent purposes." Pet. App. 19-20 (citing *Pavey v. Conley*, 663 F.3d 899, 905 (7th Cir. 2011); *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953 (9th Cir. 2005); *Thomas v. Woolum*, 337 F.3d 720, 734 (6th Cir. 2003), *abrogated on other grounds by Woodford*, 548 U.S. at 87)).

Requiring that a prisoner exhaust available administrative remedies "allows prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court." *Jones*, 549 U.S. at 204. The same is not true for an internal investigation, which is not a dispute resolution process. An internal investigation "may lead to disciplinary proceedings targeting the wayward employee but ordinarily does not offer a remedy to the prisoner who was on the receiving end of the employee's malfeasance." *Pavey*, 663 F.3d at 905. In

other words, although an internal investigation may result in subsequent disciplinary action against a correctional officer, the "only potential remed[ies] available to [the prisoner are] through the administrative grievance procedure." *Panaro*, 432 F.3d at 953.

Although Mr. Blake might have preferred not to file a grievance, the PLRA does not permit prisoners to "pick and choose how to present their concerns to prison officials." *Pavey*, 663 F.3d at 905 (citing *Woodford*, 548 U.S. at 95; *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)). Instead, "to properly exhaust administrative remedies prisoners must 'complete the administrative review process in accordance with the applicable procedural rules' – rules that are defined not by the PLRA, but by the prison grievance process itself." *Jones*, 549 U.S. at 218 (quoting *Woodford*, 548 U.S. at 88). "[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Id.*

Here, Maryland's applicable procedural rules required that Mr. Blake use the administrative remedy procedure, not an IIU investigation. *See Pavey*, 663 F.3d at 905 (explaining that the PLRA's exhaustion requirement "is concerned with the 'remedies' that have been made available to prisoners"); *Panaro*, 432 F.3d at 949 (observing that because the only potential remedies were available through the administrative grievance procedure, an inmate could not exhaust administrative remedies through participating in an internal affairs investigation); *Thomas*, 337 F.3d at 734 (explaining that the PLRA's exhaustion

requirement "is directed at exhausting the *prisoner's* administrative remedies," which a "Use of Force" investigation cannot accomplish (internal quotation omitted)). "If a prisoner can be required to submit his grievance in the particular manner and within the precise period of time designated by the prison's administrative procedures, then he must also be required to present his grievance in the proper forum." *Pavey*, 663 F.3d at 906.

Under Maryland's rules, an inmate can obtain a remedy only through the available administrative remedy procedures, while the IIU investigates allegations that a correctional officer has committed a crime or other serious misconduct, reports on the outcome of the investigation, and notifies the appropriate state officials of the result. Md. Code Ann., Corr. Servs. § 10-701; COMAR § 12.11.01.03A(1). As previously explained, the IIU does not have authority to discipline an officer or to afford any remedy to an inmate. *See supra* at 8-9. As a consequence, in the absence of any request from Mr. Blake for an administrative remedy, the prison had no opportunity to resolve any of Mr. Blake's claims for relief before he filed this suit. This in turn subverted one of the main purposes of the PLRA's exhaustion requirement: "reducing litigation to the extent complaints are satisfactorily resolved." *Jones*, 549 U.S. at 219.

The internal investigation here also did not provide the prison with a sufficient opportunity to compile a useful record as to claims against Lt. Ross. The IIU investigation was a criminal investigation

into Mr. Madigan's assault on Mr. Blake. J.A. 186. As such, the investigation identified Mr. Madigan as the only relevant "suspect" and focused on whether Mr. Madigan's use of force was excessive under the circumstances. J.A. 187, 191-95. Conversely, Lt. Ross was treated by the investigation merely "as a peripheral bystander," Pet. App. 23, and the final report contains no findings whatsoever about his conduct, J.A. 186-95.

In sum, the IIU investigation did not serve the purposes of the prison's available administrative remedy procedure, and Mr. Blake's cooperation in that investigation did not comply with the prison's requirements for an inmate seeking a remedy. The Fourth Circuit thus erred, even under its own test, in excusing Mr. Blake's failure to properly exhaust. Because the PLRA mandates that a prisoner exhaust available administrative remedies before bringing suit, and it is undisputed that Mr. Blake failed to file a grievance under the prison's administrative remedy procedure, the decision of the court of appeals should be reversed.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The question presented in the petition addresses whether the exhaustion requirement of the Prison Litigation Reform Act (PLRA) bars a lawsuit by a prisoner who made an objectively reasonable mistake when pursuing his administrative remedies. But that is not a question implicated by the facts of this case. As we have said all along and now conclusively demonstrate, respondent Shaidon Blake did everything that Maryland law required him to do. The additional procedures that petitioner asserts that respondent should have pursued were *procedurally foreclosed* and thus *un*available.

The first question presented, therefore, is:

Whether petitioner has satisfied his affirmative burden of demonstrating that respondent failed to exhaust his administrative remedies.

Even if, contrary to fact, other remedies existed for respondent to pursue, the procedures for doing so were so beset with traps and miscues that no objectively reasonable prisoner would have understood what was required of him. Every court of appeals to address circumstances like these has said (in accord, conceptually, with the decision below) that such remedies are not "available" within the meaning of the PLRA.

The second question presented is:

Whether an administrative remedy is "available" within the meaning of the PLRA when an objectively reasonable prisoner would not know which procedure to use or how to use it.

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GLOSSARY

This brief uses these acronyms and shorthand:

- **ARP**: Maryland's "Administrative Remedy Procedure."
- **the Department**: Maryland's "Department of Public Safety and Correctional Services."
- **IGO**: Maryland's "Inmate Grievance Office."
- **IIU**: Maryland's "Internal Investigative Unit."
- **PLRA**: The "Prison Litigation Reform Act."

BRIEF FOR RESPONDENT

STATEMENT

Two prison guards, petitioner and James Madigan, assaulted respondent. This is not conjecture: the prison warden himself found that respondent was the victim of "excessive" force; the prison forced Madigan to resign; and a jury has already returned a $50,000 verdict against Madigan. This is, in other words, precisely the kind of meritorious prison lawsuit that Congress *wanted* in federal court.

This case does not, however, present the question addressed by petitioner. He raises a question regarding whether the Prison Litigation Reform Act's (PLRA) exhaustion requirement bars a lawsuit by a prisoner who made an objectively reasonable mistake when pursuing his administrative remedies. But—as we demonstrate in detail—respondent made no mistake at all. In fact, the remedies and procedures that petitioner says that respondent should have pursued were categorically *un*available to him. The Court should either affirm on this basis, or it should dismiss the writ of certiorari as improvidently granted.

Petitioner's contrary argument rests on a fundamental misunderstanding of the administrative remedies available to Maryland prisoners—a telling (and troubling) fact, given that petitioner is represented by the Attorney General of Maryland. Because Maryland's Internal Investigative Unit (IIU) investigated the assault, no other administrative remedy was available to respondent. We prove this point conclusively by identifying several examples of prisoners who attempted to do what petitioner says respondent should have done. In *every* case, the filings were dis-

missed as procedurally improper. This is not subject to reasonable debate, and it resolves this case.

If the Court nonetheless reaches the question that petitioner presents, it should affirm. The PLRA requires a prisoner to exhaust "available" remedies. As the courts of appeals have uniformly held, an administrative remedy is not "available" if it is so convoluted and opaque that an objectively reasonable prisoner would not understand which procedure to use or how to use it. Although it rests on a slightly different rationale, the decision below is fully consistent with this understanding of the PLRA.

Petitioner takes the position that, in applying the PLRA's exhaustion requirement, a court can *never* consider whether a prison has adopted administrative procedures that are indecipherable. That contention, if adopted by this Court, would strip the term "available" of meaning, turn otherwise-settled PLRA law on its head, and give prisons an incentive to create bewilderingly complex administrative procedures. But as the Court suggested in *Woodford* v. *Ngo*, 548 U.S. 81, 102 (2006), a grievance procedure is not "available" if it "trip[s] up all but the most skillful prisoners."

A. Legal background.

The PLRA requires a prisoner to "exhaust[]" "such administrative remedies as are available" prior to bringing suit. 42 U.S.C. § 1997e(a).

In Maryland, the typical method for pursuing prison remedies is the Administrative Remedy Procedure (ARP). The ARP has three steps: a prisoner first files a grievance with the prison warden; the prisoner may then appeal the warden's resolution of the complaint to the Commissioner of Correction;

and, finally, the prisoner may appeal the disposition of the case to the Inmate Grievance Office (IGO). See Pet'r Br. 6-7 At the time of the assault at issue here, a prisoner had fifteen days from the incident to request an administrative remedy. See *Evans* v. *State*, 914 A.2d 25, 69 (Md. 2006) (describing fifteen-day limitations period).

Separately, Maryland maintains an Internal Investigative Unit (IIU)[1] that investigates allegations of misconduct by prison staff. The IIU has mandatory jurisdiction over claims that a prison guard used "excessive force." Md. Code Regs. § 12.11.01.05(A)(3). Maryland law provides that "[a]n agency head or a designee shall * * * [r]elinquish authority for an investigation undertaken by the IIU, including an investigation initially assigned to an agency head, or a designee, that is subsequently assumed by the IIU." *Id.* § 12.11.01.08.

On August 27, 2008 (after the incident at issue in this case), Maryland amended prison Directive 185-003; the amended directive states that, when the IIU investigates an incident, a warden must dismiss an ARP "request for procedural reasons" if it shares the "same basis" as an IIU investigation. JA 367. As we will document (see, *infra*, pages 15-24), this amendment codified then-existing practice.[2] At the time of

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[1] In 2014, Maryland changed the name of the IIU to the "Intelligence and Investigative Division." See 2014 Maryland Laws Ch. 217 (H.B. 174). All parties continue to refer to this agency as the IIU.

[2] Respondent has long maintained that this amendment codified existing practice. See Opp. Br. 17-18. Petitioner, however, contends that "the 2008 amendments to the directives did not codify pre-existing practice." Cert. Reply 5.

the incident at issue here, an ARP request would be dismissed as procedurally improper if it overlapped with an IIU investigation. See Resp. Lodging 1, 16, 18, 20, 33-38.[3]

B. Factual background.

In June 2007, respondent Shaidon Blake was an inmate at the Maryland Reception, Diagnostic, and Classification Center. Pet. App. 3. Petitioner Michael Ross was a guard at the facility. *Ibid.*

On June 21, petitioner and another guard, James Madigan, set out to move respondent to a different cell block. Pet. App. 3. Petitioner handcuffed respondent's hands behind his back (*ibid.*); respondent did not resist (*id.* at 47). Petitioner then held respondent "in an escort grip" and proceeded to move him to his new cell. *Id.* at 3. While they were walking down concrete stairs, Madigan shoved respondent from behind, forcing respondent to push his elbow

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[3] In this submission, we rely upon briefs filed in federal court, as well as exhibits appended to those briefs, that demonstrate how the Maryland administrative remedy procedure works in actual practice. All of these documents are public records: all were filed in federal court, and the exhibits are Maryland agency adjudications. Most of these documents were filed by the Maryland Attorney General. For the Court's convenience, we have submitted a paginated lodging of this material.

The Court often cites briefs filed in prior cases when they bear on a party's current position. See, *e.g.*, *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S. Ct. 1257, 1266 (2014); *Reno* v. *Bossier Par. Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000). Likewise, the Court often evaluates lodgings of analogous material. See, *e.g.*, *N.Y. Times Co.* v. *Tasini*, 533 U.S. 483, 505 n.13 (2001) (lodging of foreign court decisions); *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 736 (1998) (lodging of administrative appeals).

against the railing to avoid falling down the stairs. *Ibid.* At the bottom of the stairs, Madigan shoved respondent again. *Id.* at 4. Respondent cursed at Madigan following the second shove. *Ibid.*

Despite the fact that respondent "wasn't a threat," petitioner and Madigan nonetheless chose to brutally beat respondent. JA 44. Petitioner held respondent (still in handcuffs, see *id.* at 45) against a wall while Madigan "wrapped a key ring around his fingers and then punched [him] at least four times in the face in quick succession." Pet. App. 4. The force of the blows drove respondent's head into the wall. JA 20. Petitioner did nothing to intervene and continued to hold respondent. Pet. App. 4. After a brief pause, Madigan punched respondent again. *Ibid.* Petitioner and Madigan then lifted respondent from the ground and dropped him, violently slamming his head to the ground. *Id.* at 31, 48. Petitioner also "dropped his knee onto [respondent's] chest." *Id.* at 4. Petitioner and Madigan restrained respondent until other officers arrived. *Ibid.*

Those other guards then took respondent to the medical unit. Pet. App. 4. Respondent was later diagnosed with nerve damage. *Ibid.* He continues to suffer from persistent headaches, for which he is treated with Neurontin, a nerve pain medication. JA 28, 308.

C. The Internal Investigative Unit investigation and report.

On June 21, 2007, the very day petitioner and Madigan assaulted him, respondent lodged a complaint with prison officials. Pet. App. 4-5. His complaint named both petitioner and Madigan as wrongdoers. *Id.* at 11; JA 228-229. Respondent

claimed that Madigan punched him "about 5 good times," and petitioner "just let him do it." JA 229. During the assault, respondent asked petitioner why he would "let [Madigan] just punch me." *Ibid.* After recounting the event, respondent requested "a formal internal investigation." *Ibid.* He closed by pleading once more: "Please investigate this incident." *Id.* at 230.

In response to his complaint, the IIU initiated a year-long investigation of respondent's claims, which yielded an extensive (nearly 100-page) administrative record. Pet. App. 4-5; JA 186-260. Investigators took written statements from petitioner and Madigan (JA 23-24, 214, 216); the tier officer, Candis Fields (*id.* at 221); the first guard to arrive on the scene, Latia Woodard (*id.* at 219); the duty officer, Calvin Vincent (*id.* at 202); the shift commander, Cherie Peay (*id.* at 201); and officer Ronald Joyner (*id.* at 207). Investigators also interviewed respondent (*id.* at 169), as well as other inmates in respondent's unit (CA4 JA 66). And the investigators examined documentary evidence, including medical records (JA 243), and photographs of respondent's injuries (*id.* at 244).

Respondent understood the IIU's investigation to mean that the prison was "handl[ing]" his claim. JA 174. He testified that he did not believe that he needed to file any other grievance; as he put it, "[t]he warden instantly jumped in and involved himself." *Id.* at 173. Additionally, respondent stated that "[i]t was dealt with internally." *Ibid.*

After the IIU completed its investigation, it issued a formal, "comprehensive" report on the incident. Pet. App. 4, 31. The report made several factual findings, including that "the risk to [Madigan's]

safety was negligible at best," and that "the event could have been avoided." JA 25. The report concluded that "Madigan had used excessive force against Blake by striking him in the face while he was handcuffed." Pet. App. 4-5.

The report's findings and conclusions were confirmed by both the security chief and the prison warden. JA 25. The security chief stated that "[t]he amount of force used was not in compliance with the * * * use of force manual." CA4 JA 56. The prison warden likewise confirmed that the "[u]se of force was unnecessary [and] therefore it was excessive." *Ibid.*

As a result of the investigation, the State charged Madigan with "engaging in intentional misconduct, without justification, that seriously threatens the safety of the workplace; wantonly careless conduct in the care and custody of an inmate and excessive use of force which could reasonably be expected to result in serious bodily harm or death." JA 260-261. Madigan entered into "a settlement agreement pursuant to which he resigned in lieu of being fired." Pet. App. 32. By contrast, the "report did not assign any fault to [respondent]." *Id.* at 5. It therefore "did not recommend any disciplinary action against him." *Ibid.* Respondent, according to the prison's report, was an innocent victim.

D. Proceedings below.

1. In September 2009, respondent, acting *pro se*, filed this Section 1983 suit against petitioner and Madigan, contending that their use of excessive force violated his constitutional rights. Pet. App. 5, 29. Petitioner answered the complaint in November 2009 and then filed a motion requesting dismissal or

summary judgment in February 2010. *Ibid.* Petitioner did not assert an exhaustion defense at either time. *Ibid.* The district court denied petitioner's motion and appointed counsel to represent respondent. *Ibid.*

In August 2011, nearly two years after respondent filed suit, petitioner requested consent to file an amended answer. Pet. App. 5. Acknowledging that they intended to amend respondent's handwritten, *pro se* complaint, respondent's court-appointed counsel agreed that an amended answer would be appropriate. *Ibid.* Petitioner's amended answer asserted, for the first time, the affirmative defense of failure to exhaust administrative remedies. *Id.* at 5-6. The district court granted petitioner's consent motion less than a day after it was filed. *Id.* at 6. After respondent filed an amended complaint, petitioner filed another answer, again asserting an exhaustion defense. *Ibid.*

Respondent moved to strike petitioner's exhaustion defense from both answers, arguing that petitioner had waived the defense by not raising it earlier. Pet. App. 6. Petitioner responded by moving for summary judgment on the defense. *Ibid.*

The district court denied respondent's motion to strike and granted petitioner's motion for summary judgment. Pet. App. 46-61. The court first rejected respondent's waiver argument. *Id.* at 51-55. Turning to the question of exhaustion, the court found "that an internal investigation does not relieve prisoners of the PLRA's exhaustion requirement." *Id.* at 60. The court initially held that respondent failed to exhaust because he should have engaged in the IGO process (*id.* at 58); on reconsideration, the court changed course and suggested that respondent was also

obliged to pursue an ARP (*id.* at 41). The court entered judgment in petitioner's favor. *Id.* at 6.

The case proceeded to a jury trial as to Madigan (who never asserted an exhaustion defense). The jury found that "Madigan 'maliciously and sadistically' violated [respondent's] constitutional rights." JA 303. The jury awarded respondent $50,000 in damages. JA 6. The district court subsequently entered judgment in respondent's favor (*ibid.*), denied Madigan's request for a new trial (*id.* at 6-7), and awarded respondent attorneys' fees (*ibid.*).

Madigan did not appeal. Respondent appealed the district court's entry of judgment as to petitioner.

2. The court of appeals reversed. Pet. App. 1-28. Finding petitioner's exhaustion defense "without merit," the court did not address the question of waiver. *Id.* at 6.

The court reasoned that respondent had sufficiently exhausted his administrative remedies, even assuming he made a technical mistake of Maryland state law. Pet. App. 11-15. The court based that conclusion on two showings: (1) respondent had "an objectively reasonable belief that he had exhausted all available avenues for relief" (*id.* at 12 & n.4), and (2) respondent's actions caused an investigation by the prison that "exhausted his remedies *in a substantive sense* by affording corrections officials time and opportunity to address complaints internally" (*id.* at 10 (quotations omitted)). The court grounded this test in "traditional principles of administrative law," which resonated with "the purposes of the PLRA's exhaustion requirement." *Ibid.*

The court concluded that the facts of this case satisfy both requirements. As to the first, the court

found that respondent "reasonably interpreted Maryland's murky inmate grievance procedures." Pet. App. 15. The court specifically found "no basis for an inmate to conclude that the ARP and IIU processes would be permitted to proceed concurrently." *Id.* at 12.

As to the second, the court found that respondent's IIU investigation "clearly * * * satisfied the substantive component" of the test it applied. Pet. App. 11. After all, "[t]he Department conducted a one year investigation into [respondent's] violent encounter with Madigan and [petitioner], at the conclusion of which it issued Madigan an Unsatisfactory Report of Service and relieved him of his duties as a corrections officer." *Ibid.*

Judge Agee dissented. Pet. App. 16-28. In his view, respondent failed to exhaust his administrative remedies. *Id.* at 20. Judge Agee mainly quarreled with whether, in light of the facts of this case, it was objectively reasonable for respondent to believe that he complied with state law requirements. *Id.* at 22-27. His principal conclusion, therefore, was that "a reasonable interpretation exception does not excuse [respondent's] failure to exhaust" on the facts of this case. *Id.* at 27.

The court of appeals denied petitioner's request for rehearing *en banc* without calling for a response. Pet. App. 64. No member of the court of appeals requested a poll. *Ibid.* This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

I. The question presented in the petition and addressed in petitioner's merits brief—whether the PLRA exhaustion requirement bars a lawsuit by a

prisoner who made an objectively reasonable mistake when pursuing his administrative remedies—is not presented by the facts of this case. Here, petitioner made no mistake. Because the IIU investigated the assault, respondent could not have pursued any other form of administrative relief.

In seeking certiorari, petitioner asserted that respondent could and should have pursued relief via the "administrative remedy procedure" (ARP). That is simply wrong. In fact, routine practice during the relevant period was to dismiss ARP complaints as procedurally improper when (as in this case) an IIU investigation was pending. We document five separate cases—one of which was filed on the *same day* as the assault at issue here—in which ARP complaints were found procedurally improper in these circumstances.

Petitioner now hedges, asserting that, if respondent could not have used an ARP grievance, he could have pressed his claim via an original complaint with the Inmate Grievance Office (IGO). Not only is that inconsistent with what petitioner said in the petition, it is simply incorrect. Again, we identify specific cases in which prisoners attempted to file a direct complaint in the IGO despite an IIU investigation, and each grievance was dismissed as procedurally improper.

Because respondent pressed his claim in the only way that Maryland administrative procedures allowed, the Court should either affirm on this basis or dismiss the writ of certiorari as improvidently granted.

II. If the Court reaches the question presented in the petition, it should affirm.

The PLRA requires prisoners to exhaust only those remedies that are "available." For a remedy to be "available," it must be "accessible" and "capable of use." *Booth* v. *Churner*, 532 U.S. 731, 737-738 (2001). To fairly describe an administrative remedy as "accessible" and "capable of use," it must be sufficiently clear so that an objectively reasonable prisoner would know which remedy to use and how to use it. As the courts of appeals have uniformly held, if a prison makes its administrative procedures too convoluted—that is, if it plays "hide-and-seek" with the proper remedies—they are not "available." *Goebert* v. *Lee Cty.*, 510 F.3d 1312, 1322-1323 (11th Cir. 2007).

Here, petitioner—represented by the Attorney General of Maryland—fails to identify what specific procedure he believes respondent should have used. In his merits brief, he identifies two possible grievance procedures (the ARP and the IGO), but he does not actually commit to either one. Despite this, petitioner asserts that the PLRA's exhaustion requirement applies *whenever* a prisoner makes an error, no matter how indecipherable the prison's policies and no matter how reasonable the prisoner's misstep.

No court of which we are aware has ever accepted this drastically harsh view of the PLRA—that the clarity of an administrative remedy is wholly irrelevant to determining whether it is "available." Petitioner's position, if accepted, would provide a perverse incentive for prisons to lard their administrative grievance procedures with needless complexity in an effort to trip up prisoners.

That is not, and should not become, the law. In using the term "available," Congress set a minimal, outer boundary of clarity that a prison must satisfy to gain the benefit of the exhaustion defense under

the PLRA. If a State's prison grievance procedures are clear and transparent, its administrative remedies will always qualify as "available."

ARGUMENT

I. Petitioner Properly Exhausted All Available Administrative Remedies.

The Court need not—and should not—resolve the question presented by petitioner. The question petitioner addresses turns on the premise that respondent failed to exhaust "available" administrative remedies; he asks this Court to resolve how the PLRA's exhaustion requirement should apply to a prisoner who made an objectively reasonable mistake.

But that question is not presented by the facts of this case. Respondent did not fail to exhaust any administrative remedy that was "available" to him.[4] The Court should affirm the judgment below on this basis. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted.

A. Petitioner's premise that respondent failed to properly exhaust his available remedies is unequivocally wrong.

In his petition for certiorari, petitioner asserted that respondent failed to exhaust his administrative

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[4] Respondent has pressed this argument at every stage. He argued that the IIU was the proper means of exhaustion in the district court. See, *e.g.*, Pet. App. 38-42. In the court of appeals, he contended that he "exhausted his administrative remedies because the subject of his grievance was fully investigated by the Internal Investigative Unit and no further review was available." CA4 Dkt. No. 27, at 36. See also *id.* at 16; *id.* at 41 (similar). And, in opposing certiorari, respondent advanced this argument at length. See Opp. Br. i, 14-18.

remedies because he did not use Maryland's Administrative Remedy Procedure (ARP). Pet. 5-6. He argued that the "administrative remedy procedure" applies to "'*all* types of complaints,' including use of force claims like the one [respondent] raises here." *Id.* at 5. Petitioner thus faulted respondent for "never start[ing]—much less complet[ing]—the prison's simple grievance process." *Id.* at 6. Petitioner reiterated this theory, and just this theory, in his reply brief. See Cert. Reply 3-4.

Certiorari having now been granted, petitioner has changed his tune. He asserts that respondent failed to properly exhaust his remedies because he did not *either* "initiate an ARP grievance *or* file any claim directly with the Inmate Grievance Office." Pet'r Br. 10 (emphasis added). See also *id.* at 8. Thus, according to petitioner, respondent was required by the PLRA to have pursued one of those avenues for relief (he does not specify which) and—having failed to do so—has defaulted his claim.

There is an obvious problem with that position: In fact, respondent was procedurally *forbidden* from pursuing an ARP grievance or a claim before the IGO. That is because, when the Internal Investigative Unit (IIU) investigates an incident, no other administrative remedy is available to a prisoner. Petitioner's contrary understanding of Maryland law—both as framed in the petition and as petitioner sees it now—is simply wrong.

1. To qualify as "available," an administrative remedy must have some authority to address a prisoner's complaint.

The law as it relates to the PLRA for this purpose is clear and undisputed. The PLRA requires a

prisoner to exhaust only those remedies that are "available." 42 U.S.C. § 1997e(a). A remedy is not "available" in the statutory sense if it is a procedurally improper means of advancing a certain kind of claim.

This Court has held as much. To qualify as "available," "the administrative process" must have "authority to take some action in response to a complaint." *Booth*, 532 U.S. at 736. Conversely, exhaustion is not "required where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint." *Ibid.* "Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Id.* at 736 n.4.

Petitioner agrees. Under *Booth*, to be "available," the administrative process must entail "authority to take some action in response to a complaint." Pet'r Br. 33. Thus, petitioner does not shy from the conclusion that, "'if a prison provided no internal remedies, exhaustion would not be required.'" *Ibid.*

But what petitioner fails to acknowledge is that this is just such a case. In Maryland, when the IIU investigates an incident, the prison will dismiss any other administrative grievance as procedurally improper.

2. The Administrative Remedy Procedure was not "available" to respondent.

Petitioner's main theory of the case—and the one he advanced in his petition for certiorari—is that respondent should have pursued an ARP grievance. See Pet'r Br. 6-7, 24, 51, 55; Pet. 5-6; Cert. Reply 3-4.

In his view, it is a catchall grievance mechanism, subject to limited exceptions not applicable here.

Petitioner is wrong. Because of the IIU investigation, an ARP grievance was not available to respondent. If he had filed one, it would have been dismissed as procedurally improper.

a. State law requires that, when the IIU investigates an incident that occurred in a Maryland prison, no other inquiry may proceed in parallel. This explains why Maryland precludes a prisoner from accessing other prison administrative remedies in the face of an IIU investigation.

The IIU is the agency within the Maryland Department of Public Safety and Correctional Services responsible for investigating "[a]n alleged violation of criminal law committed by an employee while on duty" as well as "[o]ther alleged violations that have a negative impact on the Department." Md. Code Regs. § 12.11.01.03(A). In particular, the IIU must investigate "allegation[s] of excessive force by an employee." *Id.* § 12.11.01.05(A)(3).

IIU investigators have substantial authority: they may access Department facilities and records and they may compel Department employees to provide physical or testimonial evidence. Md. Code Regs. § 12.11.01.07(B). And, after the IIU begins an investigation, the IIU investigator must "[p]repare an investigative report that, at a minimum, contains (a) [c]omplete and detailed information regarding the complaint or incident; (b) [a] clear account of investigative actions; and (c) [a]ll relative information supporting the finding." *Id.* § 12.11.01.07(C)(5).

When an IIU investigation is underway, Maryland law precludes other entities within the Depart-

ment from investigating. Per regulation, after an IIU proceeding is initiated, "[a]n agency head or a designee *shall* * * * [r]elinquish authority for an investigation undertaken by the IIU, including an investigation initially assigned to an agency head, or a designee, that is subsequently assumed by the IIU." Md. Code Regs. § 12.11.01.08 (emphasis added).[5] Of course, as petitioner himself stresses (Pet'r Br. 25), the "use of a mandatory 'shall' * * * impose[s] discretionless obligations." *Lopez* v. *Davis*, 531 U.S. 230, 231 (2001).

This exclusionary provision is quite broad. The regulations define an "agency head" as "the highest authority of an agency." Md. Code Regs. § 12.11.01.02(B)(2). An "agency," in turn, is any "organization, institution, division, or unit established by statute or created by the Secretary within the Department." *Id.* § 12.11.01.02(B)(1). The regulation therefore requires all agencies within the Department to "relinquish" authority over a particular case when the IIU investigates.

b. In accordance with this regulation, on August 27, 2008 (just fourteen months after the incident at issue in this case), the Department amended Directive 185-003. JA 351-381. The amended Directive states that, when the IIU is investigating an incident, an ARP may not proceed in parallel. Section IV(N), captioned "Dismissal of a Request for Procedural Reasons" (*id.* at 364), provides:

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[5] These regulations governing the IIU went into effect on August 28, 2006, prior to the incident at issue here. See Md. Code Regs. § 12.11.01.9999. Despite citing other provisions of this Chapter, the State does not address this exclusivity provision. See Pet'r Br. 8-9.

> The Warden or institutional coordinator shall issue a final dismissal of a request for procedural reasons when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit (IIU).

Id. at 367.

We contended in the opposition brief that Directive 185-003 confirmed what had always been the practice in Maryland prisons—an IIU investigation bars a parallel ARP complaint. Opp. Br. 17-18. In reply, petitioner called our argument "unmeritorious" (Cert. Reply 3) and asserted that "the 2008 amendments to the directives did not codify pre-existing practice" (*id.* at 5). These representations were essential to petitioner's contention that the "administrative remedy procedure" was "available" to respondent. *Id.* at 3.

As we now demonstrate, petitioner is unequivocally wrong. We have conducted an exhaustive search and identified five separate cases, each decided prior to the amendment of Directive 185-003, where an ARP was dismissed as procedurally improper solely because of a parallel IIU investigation. We did not find a single case with a different outcome.

The implication of our findings—that not even the Maryland Attorney General's office can accurately describe the administrative procedures facing Maryland prisoners with meritorious claims of excessive force—is deeply troubling in its own right. But petitioner's representations on this score are all the more concerning because the defendants in all five of the cases we cite *were represented by the Maryland*

Attorney General. Indeed, in its briefs in many of the cited cases, the Attorney General's office recognized the point we press here—that an investigation by the "Internal Investigative Unit[] superced[es] an ARP investigation." Resp. Lodging 23-24 (Mem. at 3-4, Dkt. No. 14-1, *Wilkerson* v. *Funner*, No. 6-cv-575 (D. Md. July 14, 2006)).

Dwayne Bacon. On June 9, 2007 (twelve days before the incident at issue in this case), Maryland prisoner Dwayne Bacon asserted that a prison guard assaulted him. After he sued, the Maryland Attorney General filed records of Bacon's prison grievances. See Resp. Lodging 1 (Mem. Ex. 5, Dkt. No. 13-5, *Bacon* v. *Merchant*, No. 07-cv-2033 (D. Md. Feb. 27, 2008)).

Bacon filed an ARP—the very remedy that petitioner contends that respondent should have used. See Pet'r Br. 24, 51, 55. He filed his grievance on June 21, 2007, which is the same day as the assault at issue here. Resp. Lodging 1 (Mem. Ex. 5, *Bacon* v. *Merchant*, *supra*). On July 31, 2007, the prison dismissed it:

> Your Request for Administrative Remedy has been received and is hereby dismissed. This issue has been assigned to the Division of Correction's Internal Investigative Unit (Case #07-35-010621I/C), and will no longer be addressed through this process.

Ibid.

In its brief, the Maryland Attorney General's office recognized that the IIU investigation barred the ARP:

> On June 21, 2007 inmate Bacon filed a second grievance and it was dismissed because the issue had been assigned to DPSCS' IIU and would no longer be addressed through the ARP process.

Resp. Lodging 5 (Mem. at 4, *Bacon* v. *Merchant*, *supra*).

Bacon did exactly what petitioner says respondent should have done. He did it on the same day that respondent was assaulted. And his request was dismissed as procedurally improper.

Austin Gladhill. Austin Gladhill alleged that he was stabbed in the neck on June 1, 2007—twenty days before the assault in this case. See Resp. Lodging 16 (Mem. Ex. 8, Dkt. No. 33-12, *Gladhill* v. *Shearin*, No. 08-cv-3331 (D. Md. Aug. 19, 2010)). Gladhill filed an ARP complaint on June 6, 2007. *Ibid.* The prison responded tersely:

> IIU Case # 07-35-00769.

Ibid. And, for that reason, the institutional coordinator dismissed Gladhill's ARP the same day:

> This matter has been referred to the IIU, as such no further action will be taken thru the ARP.

Ibid.

On July 3, 2007, Gladhill appealed, asserting that the IIU proceeding was unrelated to his ARP. See Resp. Lodging 17 (Mem. Ex. 8, *Gladhill* v. *Shearin*, *supra*). On July 13, 2007, the ARP headquarters coordinator dismissed Gladhill's appeal:

> Appeal of admin dismiss and concur w/ ARC. Therefore your appeal is admin. dismissed—FINAL.

Ibid.

Like Bacon, Gladhill did exactly what petitioner asserts respondent should have done. He did it at the same time. And his ARP was dismissed as procedurally improper.

Joseph Wilkerson. Maryland prisoner Joseph Wilkerson also filed an ARP, asserting that prison guards assaulted him. Resp. Lodging 18 (Compl. Ex. 1, Dkt. No. 1, *Wilkerson* v. *Funner*, No. 06-cv-575 (D. Md. Mar. 6, 2006)). On January 25, 2006, the coordinator dismissed the complaint:

> Admin. Dismiss Final: This is being investigated outside of the ARP process by I.I.U.

Ibid.

In that case, the Attorney General's office recognized that "Wilkerson filed an ARP request," but "his complaint already was being investigated by the Department of Public Safety and Correctional Service's Internal Investigative Unit, *superceding an ARP investigation.*" Resp. Lodging 23-24 (*Wilkerson* v. *Funner*, *supra*) (emphasis added).

Micheal Wagner. Maryland prisoner Micheal Wagner filed an ARP grievance. The prison dismissed it on March 8, 2006:

> Your request for administrative remedy has been dismissed. An investigation has revealed that your complaint is currently under investigation by IIU. Your case# is I/C 06-35-00280.

Respondent's Lodging 33 (Mem. Ex. 7, Dkt. No. 31-7, *Wagner* v. *Galley*, No. 06-cv-1130 (D. Md. Dec. 1, 2006)).

Wayne Green. Maryland prisoner Wayne Green filed an ARP in 2002. See Respondent's Lodging 34 (Mem. Ex. 5, Dkt. No. 12, *Green* v. *Sacchet*, No. 02-1835 (D. Md. Aug. 30, 2002)). The prison dismissed it:

> This matter has been referred to the Internal Investigation Unit. As such, no further action will be taken on this issue through the Administrative Remedy Procedure.

Ibid.

We have painstakingly sifted through years of prison litigation documents in the U.S. District Court for the District of Maryland. These are the only five cases, prior to the amendment of Directive 185-003, that we have uncovered where an inmate attempted to bring an ARP grievance notwithstanding an IIU investigation.[6] In each case, the ARP was dismissed

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[6] It is unclear whether a prisoner can pursue an ARP grievance *after* an IIU investigation concludes. That issue is irrelevant here, however: when the IIU investigation concluded more than a year after the incident (JA 190), the ARP's 15-day limitations period had long since elapsed. *Evans*, 914 A.2d at 69.

In any event, it appears that an IIU investigation forever forecloses a separate ARP or IGO investigation. That is the natural reading of Md. Code Reg. § 12.11.01.08(B), and amended Directive 185-003 instructs a prison to provide the unconditional message that, "[s]ince this case shall be investigated by IIU, no further action shall be taken within the ARP process." JA 368. Maryland would have good reason to adopt this structure: principles of comity, efficiency, and finality counsel in favor of a single adjudication. Parallel investigations risk inconsistent results.

as procedurally improper. Again, we found no cases with different outcomes.[7]

These cases are conclusive. Petitioner's assertion before this Court—that IIU investigations are "entirely separate" from the "administrative remedy procedure" and can proceed in parallel (Pet'r Br. 9)—is indefensible. As respondent has insisted all along, had he filed an ARP grievance, it would have been dismissed as procedurally improper.[8]

Following the amendment of Directive 185-003, Maryland prisons have continued to dismiss an ARP whenever it is parallel to an IIU investigation. We have identified thirty opinions, written by twelve separate judges, holding that, when the IIU investigates, no other administrative remedy is available.[9] In fact, this sort of dismissal is so common that Maryland prisons often use a rubber stamp to dis-

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[7] Of course, even if petitioner could locate counterexamples, it would only show that the grievance system was so confusing that prison officials did not know how to administer it—or that the system was administered arbitrarily.

[8] If an administrative procedure is the proper means to pursue some claims but an improper means as to others, it is not "available" with respect to the latter category of claims. See *Booth*, 532 U.S. at 736 & n.4. It would be doublespeak to assert that, to "properly exhaust" a claim (*Woodford*, 548 U.S. at 101), a prisoner must use a procedure that the prison itself says is improper.

[9] See, *e.g.*, *Manzur* v. *Daney*, 2015 WL 1962182, at *3 (D. Md. 2015); *Chase* v. *U.S. Dist. Court of Maryland*, 2015 WL 1817240, at *3 (D. Md. 2015); *Miller* v. *Fisher*, 2015 WL 1402323, at *4 (D. Md. 2015); *Chew* v. *Green*, 2014 WL 4384259, at *13 (D. Md. 2014); *Oliver* v. *Harbough*, 2011 WL 6412044, at *4 (D. Md. 2011). See also, *infra*, pages 28-29 & nn.11-13.

miss ARP complaints on this basis. Resp. Lodging 35, 36, 37, 38.[10]

3. The Inmate Grievance Office was not "available" to respondent.

Perhaps anticipating these problems, petitioner contends as a fallback that, "[i]f the administrative remedy procedure is not available for a particular type of claim, an inmate may file a grievance directly with the Inmate Grievance Office." Pet'r Br. 8. Petitioner did not advance this argument in his petition for certiorari; at that time, his position was that the ARP was an exclusive, "comprehensive, easy-to-understand administrative system." Pet. 5. See also Cert. Reply 3-4. He described the IGO solely as an *appellate* venue. Pet. 5-6.

Petitioner is wrong once again. A direct complaint with the IGO was not an alternative administrative remedy that respondent could have used to pursue his claim.

a. To begin with, petitioner's IGO argument scuttles his principal theory of the case—that all respondent had to do was to follow the steps laid out in the prison handbook. See Pet'r Br. 7. Petitioner asserts that the handbook "summarizes the procedures in layman's terms" (*ibid.*) and "plainly states" the method for exhausting a claim (Cert. Reply 4). But *nothing* in the handbook instructs an inmate whether or when to bypass the ARP and "file a grievance directly with the Inmate Grievance Office." Pet'r Br.

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[10] It does not matter *who* initiates the IIU investigation. When the warden "convened a formal investigation into the incident," the IIU process nonetheless foreclosed an ARP. *Grimes* v. *Warden*, 2012 WL 2575373, at *4 (D. Md. 2012).

8. Instead, the handbook (like the petition for certiorari) treats the IGO as solely the *appellate* body for an ARP. It expressly conditions the filing of an IGO complaint on the completion of the ARP process: "[t]he IGO *reviews* grievances and complaints of inmates against the Division of Correction * * * *after* the inmate has exhausted institutional complaint procedures, such as the Administrative Remedy Procedure." Pet. App. 78 (emphasis added).

b. Moreover, the IIU exclusivity provision applies with full force to the IGO. As we have explained, all other agencies within the Maryland Department of Public Safety and Correctional Services must "[r]elinquish authority for an investigation undertaken by the IIU." Md. Code Regs. § 12.11.01.08. The IGO is an agency within the Department and is thus subject to this regulation. See Md. Code Ann., Corr. Servs. § 10-202 ("There is an Inmate Grievance Office in the Department."). See also Pet'r Br. 7 (the IGO is "within the Department").

c. Beyond that, petitioner's assertion that respondent could have brought an original complaint with the IGO is belied by the IGO's own exhaustion requirement. The IGO requires that, "[i]f the administrative remedy procedure applies to a particular situation or occurrence, the grievant shall properly exhaust the administrative remedy procedure before filing a grievance with the Office." Md. Code Regs. § 12.07.01.02(D). On multiple occasions, the IGO has understood this regulation to foreclose a prisoner from bringing a direct complaint in the IGO, *even when* that prisoner's ARP had already been dismissed as procedurally improper in light of an IIU investigation.

As we described earlier, prior to the amendment of Directive 185-003, Joseph Wilkerson's ARP was dismissed on the basis of a parallel IIU investigation. See, *supra*, page 21. After this dismissal, Wilkerson filed an original grievance with the IGO, alleging "[a]ssault by [o]fficers." Resp. Lodging 19 (Mem. Ex. 2, Dkt. No. 14-2, *Wilkerson* v. *Funner*, *supra*).

On January 10, 2006, Paula Williams, the Associate Director of the IGO, "administratively dismiss[ed]" the complaint because it was "one which must first be presented through the Administrative Remedy Procedure (ARP)." *Ibid.* Wilkerson followed the IGO's instruction to file a second ARP grievance. *Id.* at 20. Like the first, it was also dismissed as procedurally improper:

> Admin. Dismiss Final. Your complaint is outside of the ARP process and you must direct your issue to IIU through Case #05-35-001434.

Ibid.

This was nothing more than a shell game. Wilkerson filed an ARP grievance, and it was dismissed as procedurally improper. He filed an original IGO grievance, which was dismissed as procedurally improper. He followed the IGO's direction to refile an ARP, which was *also* dismissed as procedurally improper.

For its part, the Attorney General's office plainly recognized that Wilkerson had no administrative remedy beyond the IIU:

> Wilkerson sought to complain about the incident to the Inmate Grievance Office, which advised him that he must first present his

> complaint through the administrative remedy procedure ("ARP"). *See* Exhibit 1 at pages 36-38. Wilkerson filed an ARP request. However, his complaint already was being investigated by the Department of Public Safety and Correctional Service's Internal Investigative Unit, *superceding an ARP investigation. Id* at 38.

Resp. Lodging 23-24 (Mem. at 3-4, Dkt. No. 14-1 *Wilkerson* v. *Funner*, *supra*) (emphasis added).

The IGO treated an original complaint by Donald Pevia the same way. Pevia's ARP was dismissed based on a parallel IIU investigation: the "IIU was notified regarding this incident," and thus "your case has been dismissed." Resp. Lodging 41 (Mem. Attach., *Pevia* v. *Shearin*, No. 13-cv-2912 (D. Md. May 12, 2014)).

While the appeal of his ARP dismissal was pending, Pevia did what petitioner now suggests respondent could have done—he filed a complaint directly with the IGO, bypassing the ARP system. He did so, he explained, because he did not know if it was necessary to preserve his rights:

> I am filing this Complaint against [prison] staff. I have followed all A.R.P remedies[.] Warden and then A.R.P. Appeal to the Commissioner. * * * I do not know if I was suppose to wait for a final response from them. So I just went to I.G.O. to cover my back before my deadline would expire.

Resp. Lodging 39-40 (Mem. at Attach., *Pevia* v. *Shearin*, *supra*). In filing this original complaint, Pevia enclosed his ARP denial. *Ibid.*

But the IGO dismissed Pevia's original complaint on failure-to-exhaust grounds. Resp. Lodging 42-43 (Mem. at Attach., *Pevia* v. *Shearin*, *supra*). Paula Williams found that "this grievance is premature because you failed properly to exhaust the ARP process before filing this grievance, in violation of COMAR 12.07.01.02(D)." *Id.* at 43. She concluded, moreover, that "the exhaustion requirement has not been waived for good cause shown." *Ibid.* Thus, notwithstanding that Pevia had documented to the IGO that the ARP process was unavailable to him because of the IIU investigation, the IGO dismissed an original complaint as procedurally improper.

d. Finally, consistent practice in the District of Maryland forecloses petitioner's assertion—made without evidence or example—that respondent could have filed a complaint directly with the IGO. Following the amendment to Directive 185-003, dozens of cases have held that, when the IIU investigates, *no* other administrative remedy remains available.

- "Plaintiff's claim was referred to the IIU, therefore, the administrative processing of that ARP ceased. There were no further remedies available to Plaintiff once the IIU began its investigation of his claim of excessive force."[11]
- "This court is familiar with the Division of Correction's practice to decline an investigation for an ARP where one is already pending before the IIU. Thus, the court concludes that the exhaustion requirement regarding the al-

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[11] *Shiheed* v. *Shaffer*, 2015 WL 4984505, at *3 (D. Md. 2015). See also *Shiheed* v. *Fann*, 2014 WL 883958, at *5 (D. Md. 2014).

leged excessive use of force is satisfied where, as here, the administrative procedure may be unavailable."[12]

- "The court is aware that once a claim of excessive force is referred to IIU no further administrative remedy proceedings may occur."[13]

In these cases, the district court repeatedly held that an IIU investigation precluded *any* administrative remedy. If filing a direct complaint with the IGO were in fact an administrative remedy available to prisoners in these circumstances, one would expect the state lawyers who litigate these matters on a daily basis to make that exhaustion argument. They do not.

For all of these reasons, petitioner is simply wrong to speculate, without any concrete authority, that respondent could have pursued his claim via an original complaint with the IGO. See Pet'r Br. 8. Had he done so, the State's practices at the relevant time show that the complaint would have been dismissed as procedurally improper. Nor was there any handbook, directive, or other written policy instructing

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[12] *Green* v. *Pritts*, 2015 WL 4671327, at *4 (D. Md. 2015). See also *Cooper* v. *Brinegar*, 2015 WL 5288379, at *8 n.17 (D. Md. 2015); *Skinner* v. *Ibeadogbulem*, 2015 WL 736684, at *4 n.2 (D. Md. 2015); *Horner* v. *Corcoran*, 2015 WL 1736667, at *8 (D. Md. 2015); *Crudup* v. *Englehart*, 2014 WL 3563625, at *5 (D. Md. 2014); *Lynch* v. *Kenion*, 2014 WL 4406672, at *5 (D. Md. 2014); *Calhoun-El* v. *Bishop*, 2014 WL 6713112, at *9 (D. Md. 2014).

[13] *Kitchen* v. *Ickes*, 2015 WL 4378159, at *8 (D. Md. 2015). See also *Young* v. *Webb*, 2014 WL 2772815, at *13 n.10 (D. Md. 2014). Several other decisions used similar language.

inmates to bypass the ARP and file directly with the IGO for this kind of claim.

* * *

Finally, petitioner misses the point when he asserts that the IIU does not qualify as an administrative remedy because it "does not have any authority to remedy a prisoner's complaint." Pet'r Br. 8.[14] The fact of the matter is, an IIU investigation occurred. If an IIU investigation is an "administrative remedy," respondent undeniably exhausted it. If it was not, then no administrative remedy was "available" at all.

What matters is that the IIU investigation barred respondent from pursuing his claim in the way that petitioner posits he should have—via the traditional ARP proceeding as well as via an original complaint with the IGO. This is not a case where a prisoner failed to make use of an "available" administrative remedy.[15]

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[14] The Court has eschewed any rigid definition of what qualifies as an administrative remedy; it has said that the procedure need not provide a prisoner the precise remedy he seeks, such as compensation. See *Booth*, 532 U.S. at 736.

[15] It is not our position that any prison disciplinary investigation in any state satisfies the PLRA exhaustion requirement. Contra Pet'r Br. 52; U.S. Br. 21. Maryland has made the deliberate choice to treat its disciplinary investigation system as *preclusive* of any other administrative remedy. This says nothing about other prison systems that permit disciplinary investigations to coexist with grievance procedures. Cf. *Pavey* v. *Conley*, 663 F.3d 899, 905 (7th Cir. 2011); *Panaro* v. *City of N. Las Vegas*, 432 F.3d 949, 953 (9th Cir. 2005); *Thomas* v. *Woolum*, 337 F.3d 720, 734 (6th Cir. 2003).

B. The Court should either affirm on this basis, or it should dismiss the writ of certiorari as improvidently granted.

In circumstances like these, the Court should either affirm the judgment of the court of appeals on these alternative grounds, or it should dismiss the writ of certiorari as improvidently granted.

1. The Court may always rest on "alternative grounds for affirmance." *United States* v. *Tinklenberg*, 131 S. Ct. 2007, 2017 (2011). Indeed, it "'is well accepted' that the respondent may * * * 'rely upon any matter appearing in the record in support of the judgment.'" *Union Pac. R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 80 (2009). See also *Brown* v. *Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2743 n.1 (2011) (Alito, J., concurring in the judgment) ("It is well established that a judgment may be affirmed on an alternative ground that was properly raised but not addressed by the lower court.").

Here, respondent either exhausted the administrative remedy that was "available" (the IIU investigation) or no remedy was "available" at all. Either way, respondent did not fail to exhaust any "available" remedy; petitioner is not, therefore, entitled to dismissal of this lawsuit on failure-to-exhaust grounds.

This is especially so insofar as the burden of proof rests with petitioner. "[F]ailure to exhaust is an affirmative defense under the PLRA," and a prisoner need not "specially plead or demonstrate exhaustion in their complaints." *Jones* v. *Bock*, 549 U.S. 199, 216 (2007). "Ordinarily, it is incumbent on the defendant to plead and prove such a defense." *Taylor* v.

Sturgell, 553 U.S. 880, 907 (2008) (citing *Jones*). Every court of appeals has understood *Jones* to place the burden on the defendant who invokes an exhaustion defense.[16]

We have conclusively demonstrated that respondent did everything Maryland law required of him. Of course, because he bears the burden, petitioner "loses if the evidence is closely balanced." *Schaffer* ex rel. *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005). Since the evidence here is entirely one-sided, it follows that petitioner has failed to prove that he is entitled to the exhaustion defense. This straightforward conclusion should dispose of this case.

2. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted. Such dismissals are appropriate where, as here, "the question framed in the petition for certiorari is not in fact presented by the record." *Belcher* v. *Stengel*, 429 U.S. 118, 119 (1976). Dismissal of a petition as improvidently granted may be appropriate when, in other words, "[d]ecision of the question upon which certiorari was granted [is] unnecessary because the judgment below was clearly correct on another ground." Stephen M. Shapiro, et al., Supreme Court Practice 362 (10th ed. 2013). That is the case here.

While dismissal would be appropriate for this reason alone, additional factors counsel in favor of

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[16] See, *e.g.*, *Hubbs* v. *Suffolk Cty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015); *Moore* v. *Bennette*, 517 F.3d 717, 725 (4th Cir. 2008); *Davis* v. *Hernandez*, 798 F.3d 290, 294-295 (5th Cir. 2015); *Lee* v. *Willey*, 789 F.3d 673, 677 (6th Cir. 2015); *Maddox* v. *Love*, 655 F.3d 709, 720 (7th Cir. 2011); *Porter* v. *Sturm*, 781 F.3d 448, 451 (8th Cir. 2015).

dismissing the writ of certiorari as improvidently granted.

First, the petition for certiorari made several representations concerning the contours of Maryland law that simply do not withstand scrutiny. Petitioner asserted, for example, that, "if [respondent] had followed the prison's normal grievance procedure [through the ARP], he would have had the opportunity to request other relief, including monetary compensation." Cert. Pet. 6-7. In his reply brief, petitioner labeled our contrary description of the relationship between the IIU and the ARP "unmeritorious." Cert. Reply 3. And he doubled down on his assertion that the "administrative remedy procedure" was "available" to respondent. *Id.* at 3-4.

There is no longer any doubt that those assertions are wrong. The cases we have uncovered—all litigated by the Attorney General's office itself—uniformly demonstrate how the administrative remedy process actually worked. When, as here, the "grant of the writ of certiorari * * * was predicated on [a] mistaken representation," dismissal is appropriate. *Bostic* v. *United States*, 402 U.S. 547, 548 (1971).

Second, dismissal is appropriate where, as here, the alternative ground is a question of state law. See *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing where the "controversy * * * primarily implicates questions of Pennsylvania law and presents no federal question of substance"). At bottom, this is a disagreement about what Maryland law actually required.

And, *finally*, the decision below has no prospective importance. In light of Directive 185-003, Maryland can no longer make the exhaustion argument

that it advances in this case. But if the approach taken by the court of appeals is employed again—in a case where the facts make that legal holding relevant—the Court can review the issue at that time.

II. The Relevant Administrative Procedure Is Too Indecipherable To Be "Available."

If the Court nonetheless reaches the question presented in the petition, it should affirm. An administrative remedy is not "available" within the meaning of the PLRA if an objectively reasonable prisoner would not know which procedure to use or how to use it.

That describes this case. In the interval between filing his petition for certiorari and filing his brief on the merits, petitioner has revised his theory of what he believes respondent should have done to exhaust his claim. In the petition, he asserted that respondent failed to exhaust because he did not file a complaint via the ARP See Cert. Pet. 5-6; Cert. Reply 3-4. Now, in his merits brief, petitioner asserts that respondent failed to exhaust because he did not "initiate an ARP grievance *or* file any claim directly with the Inmate Grievance Office." Pet'r Br. 10 (emphasis added).

Even with the benefit of counsel from the Maryland Attorney General's Office, petitioner cannot tell this Court with precision and conviction what it is that respondent should have done. That is proof positive that the grievance procedures facing respondent at the time were so objectively unclear as to be "unavailable" within the meaning of the PLRA.

Against this backdrop, the legal rule petitioner seeks is nothing short of incredible. Despite his own hedging, petitioner contends that, if respondent

picked the wrong administrative procedure during the fifteen-day window the State afforded him to file an administrative claim, he should be forever barred from federal court. According to petitioner, all that matters is whether a particular remedy *exists*—the opacity of the administrative procedure is, in his view, irrelevant. Pet'r Br. 34, 38.

That is not, and should not become, the law. The PLRA is not a license for prisons to craft convoluted administrative procedures, leaving prisoners to guess at the proper remedies for a particular claim, and to then bar lawsuits by prisoners who guess wrong.

In *Woodford*, this Court intentionally left open the prospect that, if a prison "create[s] procedural requirements for the purpose of tripping up all but the most skillful prisoners," the administrative remedy is not available. *Woodford* v. *Ngo*, 548 U.S. 81, 102 (2006). That is a correct statement of law under the PLRA. As Chief Judge Ed Carnes later wrote for the Eleventh Circuit, a prison may not "play hide-and-seek with administrative remedies": to qualify as "available," a prisoner must be able to "discover through reasonable effort" the correct procedure to use. *Goebert*, 510 F.3d at 1322-1323.

A. For a remedy to be "available," an objectively reasonable prisoner must be able to understand how to use it.

"The inquiry begins with the statutory text," and it "ends there" when, as here, "the text is unambiguous." *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 177 (2004). A prison administrative remedy is "available" only if an objectively reasonable prisoner would know *which* remedy to use and *how* to use it.

Every court of appeals to have considered the issue agrees. And despite the fact that we made this argument in the brief in opposition to certiorari (Opp. Br. 30-32), petitioner offers no meaningful response.

1. Section 1997e(a) directs that a prisoner must exhaust those "administrative remedies" that are "available." As this Court has held, the word "available" as used in this statute means "'capable of use for the accomplishment of a purpose'" and "that which 'is accessible or may be obtained.'" *Booth*, 532 U.S. at 737-738 (quoting Webster's Third New International Dictionary 150 (1993)).

In *Booth*, the Court addressed the extent to which the *adjudicator* must be authorized to provide relief in order for the administrative remedy to be "available." As the Court explained, for an administrative remedy to be "available," that "presuppose[s]" that there is "some redress for a wrong." *Id.* at 736. If "administrative officers * * * have no authority on the subject of the complaint," no remedy is available, "leaving the inmate with nothing to exhaust." *Id.* at 736 n.4.

This case involves a different facet of what it means for an administrative remedy to be "available." It is the issue on which this Court expressly reserved judgment in *Woodford*: how the PLRA exhaustion requirement applies in a situation where a prison creates procedural requirements that are so convoluted and opaque that no one would know how to use them. See 548 U.S. at 102.

The answer to that question is straightforward. For an administrative remedy to be fairly described as "capable of use for the accomplishment of a purpose" or "that which is accessible," prisoners must be

able to decipher how to use it. If a prison's administrative procedure is so perplexing that a prisoner can do no more than guess, the remedy is not "available."

As the lower court essentially recognized—albeit without couching it in the statutory text (see Pet. App. 10)—the test for this inquiry is whether an objectively reasonable prisoner would understand the grievance procedure. "Objective reasonableness," of course, is a standard well known and frequently applied in a broad range of legal questions; it considers what is reasonable against the relevant facts and circumstances. See, *e.g.*, *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (Fourth and Fourteenth Amendments); *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2404 (2011) (tort law); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011) (Fair Labor Standards Act).

The Court need not take our word for it. Like us, the United States takes the position that "prisons" do not "have *carte blanche* to adopt procedural requirements that are designed to 'trip[] up all but the most skillful prisoners.'" U.S. Br. 21 (quoting *Woodford*, 548 U.S. at 102). The United States thus proposes the very same rule that we here advance:

> If grievance procedures are so bewildering that no reasonable prisoner could discern them, or are an endless morass reminiscent of *Bleak House*, then an administrative remedy would not be "available" and a prisoner would not need to exhaust.

Ibid. That is surely correct. If an objectively reasonable prisoner could not discern the relevant grievance

procedure, it is not an "available" administrative remedy.[17]

The text of Section 1997e(a) allows no other result. If an objectively reasonable prisoner would not know what administrative remedy to use or how to use it, no one would describe that remedy as "capable of use" or "accessible." A remedy that is too convoluted is not one that is "available" for purposes of the PLRA.

The question in this case is not, therefore, whether respondent "properly exhaust[ed]" his administrative remedies. *Woodford*, 548 U.S. at 101. It is whether any administrative remedy that respondent did not use was "available" at all, within the meaning of the statute.

2. Petitioner's argument to this Court is, in actuality, a sly attempt to undo nearly two decades of consistent holdings by the courts of appeals. The lower courts have broadly agreed that administrative remedies must be sufficiently clear to an objectively reasonable prisoner to count as "available."

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[17] The United States supports petitioner because it understandably takes as given the Maryland Attorney General's recitation of Maryland's prison administrative procedures. See U.S. Br. 4-5. That is how the United States concludes that respondent "failed to properly exhaust administrative remedies that were available to him." *Id.* at 7. We have shown this to be wrong. At the very least, if any administrative procedure can qualify as "bewildering," this must be it. See Charles Dickens, *Bleak House* 104 (Barnes & Noble 2005) (1853) ("'[Y]ou don't understand this Chancery business?' And of course I shook my head. 'I don't know who does,' he returned. 'The Lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth.'").

Chief Judge Ed Carnes's opinion for the Eleventh Circuit in *Goebert* is but one example. There, he explained that "[i]t is difficult to define 'such remedies as are available' to an inmate in a way that includes remedies or requirements for remedies that an inmate does not know about, and cannot discover through reasonable effort by the time they are needed." *Goebert*, 510 F.3d at 1322 (quoting 42 U.S.C. § 1997e(a)). He thus resolutely rejected the same argument advanced by petitioner here, "that any remedy that is in place is 'available' to the inmate even if the inmate does not know, and cannot find out, about it." *Ibid.* "That argument," Chief Judge Carnes explained, "could have been inspired by the Queen of Hearts' Croquet game, since there is nothing on this side of the rabbit hole to support it." *Ibid.* He summed up:

> If we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along. The Queen would be proud.

Id. at 1323. Elsewhere, the Eleventh Circuit stated our argument in a nutshell: "[r]emedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." *Turner* v. *Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008).

Writing for the Ninth Circuit, Judge N.R. Smith expressly adopted the reasoning of *Goebert*. See *Albino* v. *Baca*, 697 F.3d 1023, 1037 (9th Cir. 2012). The Third Circuit has similarly explained that "[r]emedies that are not reasonably communicated to inmates may be considered unavailable for exhaus-

tion purposes." *Small* v. *Camden Cty.*, 728 F.3d 265, 271 (3d Cir. 2013). In *Brown* v. *Croak*, 312 F.3d 109, 111 (3d Cir. 2002), it was accepted that a prisoner failed to comply with an administrative procedure, but the Third Circuit held that "the formal grievance proceeding * * * was never 'available'" because the prison staff misled the prisoner as to the status of the investigation and thus rendered the proper exhaustion procedure unclear. *Id.* at 113.

For the Seventh Circuit, Judge Sykes explained that "if prison officials misled [a prisoner] into thinking that by participating in the internal-affairs investigation, he had done all he needed to initiate the grievance process," then "[a]n administrative remedy is not 'available,' and therefore need not be exhausted." *Pavey* v. *Conley*, 663 F.3d 899, 906 (7th Cir. 2011). See also *Dole* v. *Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ("[P]rison authorities may not employ their own mistake to shield them from possible liability, relying upon the likelihood that a prisoner will not know what to do when a timely appeal is never received.").

Likewise, as the Fifth Circuit held, "[g]rievance procedures are unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process." *Davis* v. *Hernandez*, 798 F.3d 290, 295 (5th Cir. 2015). See also *Dillon* v. *Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("We have long recognized the importance of ensuring that inmates have avenues for discovering the procedural rules governing their grievances."); *Toomer* v. *BCDC*, 537 F. App'x 204, 206 (4th Cir. 2013) (unclear instructions rendered further remedies unavailable).

It is not just active "interference" by prison staff, like refusal to provide complaint forms (Pet'r Br. 34 & n.9), that can render a prison remedy unavailable. If a reasonable prisoner does not know which procedure to use or how to use it, the remedy is not "available." It makes no difference whether a prison trips up prisoners by crafting a confusing system or by misleading prisoners about the system's rules. The fundamental principle is the same: a remedy "which is unknown and unknowable is unavailable." *Goebert*, 510 F.3d at 1323.

To be sure, the lower court did not couch its decision in terms of the statutory word "available." It instead invoked "traditional principles of administrative law" to conclude that "an uncounseled inmate attempting to navigate the grievance system will not be penalized for making a reasonable, albeit flawed, attempt to comply with the relevant administrative procedures." Pet. App. 10. And, ultimately, it considered what an "objectively reasonable" prisoner would understand in the circumstances. *Id.* at 12 n.4.

That is the same standard that we advance here. Whether or not the rule is articulated as one stemming from the plain meaning of the word "available" or from traditional principles of administrative law is a distinction without a substantive difference. All courts of appeals to address the issue uniformly agree that the "availability" prong under the PLRA is not satisfied when "prisons * * * play hide-and-seek with administrative remedies." *Goebert*, 510 F.3d at 1323.

Petitioner, by contrast, is of the view that the clarity of a state's administrative procedures is *irrelevant* in assessing whether a particular remedy is "available." See Pet'r Br. 34, 38. That drastic inter-

pretation of the PLRA finds no support whatsoever in the courts of appeals.[18] The Court should reject petitioner's attempt at fundamentally upsetting otherwise-settled PLRA principles.

3. Notwithstanding our showing in the opposition brief that this case is properly viewed as turning on the meaning of the term "available" (Opp. Br. 30-32), petitioner has exceedingly little to say about this express limitation on the scope of the exhaustion requirement. See Pet'r Br. 33-34.

Petitioner first asserts that, "to determine whether a particular administrative remedy must be exhausted, Congress directed courts to 'focus solely' on whether that remedy is available." Pet'r Br. 33. But that sidesteps the real question—*what* remedies qualify as "available." Petitioner never proposes a meaningful interpretation of this key term.

Petitioner contends that "the term 'available' does not contain a subjective element that would hinge on the inmate's belief as to the existence, accessibility, or necessity of compliance with such remedy." Pet'r Br. 33. On this point, at least, we have

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[18] None of the authority cited by petitioner defines the term "available" in a way at odds with our argument. See Pet'r Br. 32 & n.8. In *Gonzalez* v. *Seal*, 702 F.3d 785, 788 (5th Cir. 2012), the Fifth Circuit did not decide what qualifies as "available administrative remedies." *Chelette* v. *Harris*, 229 F.3d 684, 688 (8th Cir. 2000), rejected crafting an exhaustion exception for "a prisoner's *subjective* beliefs, logical or otherwise." But *Chelette* also did not address what constitutes an "available" remedy, and we do not argue that a prisoner's *subjective* view is relevant. *Nyhuis* v. *Reno*, 204 F.3d 65, 73 (3d Cir. 2000), and *Alexander* v. *Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998), rejected a futility or inadequacy exception, but did not reject the argument we advance here.

common ground: nothing in our argument suggests that an inmate's subjective belief is a sufficient basis to render a prison remedy "unavailable." Of course a prisoner cannot make a self-serving statement that he was confused and, on that basis alone, avoid the exhaustion requirement.

Petitioner recognizes, and even appears to endorse, the decisions of the courts of appeals that hold an administrative remedy is not "available" if the prison staff precludes the prisoner from using it. Pet'r Br. 34 & n.9. But petitioner does not attempt to fit this law into a unified understanding of what he believes the term "available" to mean. Our view of the law, by contrast, is consistent: a remedy is not "available" if an objectively reasonable prisoner cannot use it. That may be because the system is too bewilderingly complex for a prisoner to figure out the correct procedure. Or it may be because prison staff engages in activity that would preclude an objectively reasonable prisoner from using that procedure.

Finally, petitioner twice repeats his fact-based contention that "[i]t is beyond reasonable dispute that the administrative remedy process was available to" respondent because the grievance authority could "'take some action in response to a complaint.'" Pet'r Br. 33. See also *id.* at 34-35. We have shown that these representations are false. See, *supra*, pages 15-30. In any event, this is nonresponsive to our *legal* argument as to what the word "available" means in Section 1997e(a).

B. Habeas and administrative exhaustion principles confirm this understanding of "available."

To the extent that the meaning of "available" admits of any ambiguity—we submit that there is none—habeas and administrative law confirm our understanding of the PLRA's exhaustion regime. Because "[e]xhaustion is an important doctrine in both administrative and habeas law," this Court often "look[s] to those bodies of law for guidance" in construing the PLRA. *Woodford*, 548 U.S. at 88.

Petitioner argues that "[t]he language of the PLRA * * * does not admit of a reasonable belief exception or, for that matter, any other judicially-created exceptions" because, "[t]o comply with the statute, if administrative remedies are *available*, a prisoner must exhaust them." Pet'r Br. 25 (emphasis added). But that argument fails to appreciate the point—well established by this Court—that understanding what remedies qualify as "available" is a task that must look, when necessary, to the habeas and administrative analogs to the PLRA. *Woodford*, 548 U.S. at 93.

1. Habeas law supports our interpretation of the PLRA's exhaustion requirement. "The law of habeas corpus has rules that are substantively similar" to the PLRA's exhaustion requirement. *Woodford*, 548 U.S. at 88, 92. Section 2254, for example, uses the same crucial term, "available," as the PLRA. It requires an applicant to "exhaust[] the remedies *available* in the courts of the State" or show that there is "an absence of *available* State corrective process." 28 U.S.C. § 2254(b)(1) (emphasis added).

Like a PLRA plaintiff, a habeas applicant must typically comply with all procedural requirements established by a state; this "procedural default" doctrine is "'similar in purpose and design'" to PLRA exhaustion. *Woodford*, 548 U.S. at 92-93. But the procedural default rule does not apply "where a prisoner is impeded or obstructed in complying with the State's established procedures." *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1318 (2012). This generally requires a showing of "cause and prejudice," which "must be something *external* to the [applicant], something that cannot fairly be attributed to him." *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991).

A complex or opaque state procedural requirement can constitute such cause. The Court has long held that "'[t]he exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the (alternatives) is appropriate or effective.'" *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971) (quoting *Marino* v. *Ragen*, 332 U.S. 561, 568 (1947) (Rutledge, J., concurring)). Indeed, the Court has "held that state prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999).

Thus, a habeas "petitioner does not have to participate in a guessing game as to whether the chosen form of state action was the proper one." *Mayfield* v. *Ford*, 664 F. Supp. 1285, 1287 (D. Neb. 1987). See also *Carter* v. *Estelle*, 677 F.2d 427, 446-447 (5th Cir.

1982) (exhaustion not required where the state's procedures "are so cumbersome, complex, and confusing that they frustrate good faith attempts to comply with them").

So too with respect to the PLRA. If an objectively reasonable prisoner is left to a "guessing game" as to how to pursue his claim, no administrative remedy is "available."[19]

2. Administrative law lends further support to that conclusion. Section 1997e, which refers to "administrative" remedies, "points to the doctrine of exhaustion in administrative law." *Woodford*, 548 U.S. at 93. Indeed, Congress amended Section 1997e to bring the preexisting exhaustion requirement of the Civil Rights of Institutionalized Persons Act (CRIPA) "more into line with administrative exhaustion rules that apply in other contexts." 142 Cong. Rec. 5195 (1996) (statement of Assoc. Att'y Gen. John Schmidt).

As the court of appeals recognized, "the exhaustion requirement is not absolute" in administrative law. Pet. App. 9. At common law, the doctrine of exhaustion is "subject to numerous exceptions." *McKart* v. *United States*, 395 U.S. 185, 193 (1969). See also *Woodford*, 548 U.S. at 103 (Breyer, J., concurring) ("Administrative law, however, contains well-established exceptions to exhaustion."). As a general mat-

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[19] In briefly addressing habeas, the United States solely makes a factual argument—that "there was no external, objective impediment to respondent complying with the prison's grievance procedures." U.S. Br. 19 n.4. But that just assumes away the core dispute as to whether Maryland's exhaustion system was a confusing one. As the court of appeals below held, it was substantially confusing. Pet. App. 15. It is notable that the United States does not deny our legal contention.

ter, "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992).

When a reasonable claimant would not understand how to use an administrative remedy, longstanding administrative law principles do not require exhaustion. This is compelled by the family of cases that petitioner characterizes as "undue prejudice" or "hardship." See Pet'r Br. 45-46.

Bowen v. *City of New York*, 476 U.S. 467 (1986), is instructive. There, claimants for social security disability benefits challenged a procedure used by the Social Security Administration for determining benefit eligibility. 476 U.S. at 469. They asserted that the Administration had "adopted an unlawful, unpublished policy under which countless deserving claimants were denied benefits." *Id.* at 473. Not all claimants, however, had properly exhausted their claims before the Administration. *Id.* at 482. The Court nonetheless found that the exhaustion requirement was "excused" because "'members of the class could not attack a policy they could not be aware existed.'" *Ibid.* The reasoning of the Court was straightforward: if a claimant cannot reasonably know what it is he or she should be complaining about to an agency, there is nothing for the claimant to exhaust.[20]

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[20] Going even further, the Court declined to require exhaustion from those litigants who could still have pursued an administrative remedy because they would have been "irreparably injured." *Bowen*, 476 U.S. at 482-486. That reasoning would support an extra-textual exception to the PLRA's exhaustion re-

Administrative law principles—like the Court's habeas precedents—thus confirm that, in limiting the PLRA exhaustion requirement to those remedies that are "available," Congress intended to require prisoners to exhaust only those remedies that an objectively reasonable prisoner would understand how to use.

C. The statutory purpose compels our interpretation of "available."

The PLRA's exhaustion mechanism is not an invitation for prisons to erect indecipherable administrative barriers, and thus bar from court any prisoner who fails to navigate the opaque remedial system with precision. Congress introduced the concept of "availability" to ensure that prisons maintain a minimal standard of clarity with respect to their administrative procedures.

1. If the Court reaches the question posed in the petition, this case will have profound implications for prison administrative procedures.

If the Court affirms the longstanding meaning of "available," the States will continue to have an incentive to promulgate and administer clear prison grievance procedures that will inform objectively reasonable prisoners how to pursue their claims. If a prison's procedures are clear, they will be "available."

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quirement, in accord with the analysis adopted by the court of appeals. See Pet. App. 9-11. Indeed, the Court has recognized time and again that "[a]dministrative remedies that are inadequate need not be exhausted." *Coit Indep. Joint Venture* v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989). We submit, however, that the Court need only resort to extra-textual exceptions if it disagrees with our (and the United States') interpretation of the statutory term "available."

Petitioner's contrary view—that courts can *never* "scrutinize the adequacy of a prison's administrative remedy process to determine whether it met a particular standard of clarity * * *" (Pet'r Br. 37-38)—would encourage prisons to lard their administrative procedures with ever greater complexity. Indeed, absent an outer limit, "the PLRA's exhaustion rule actually provides an incentive to administrators in the state and federal prison systems and the over 3,000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes." See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons*, 11 U. Pa. J. Const. L. 139, 149 (2008). It is thus easy to see why Congress intended to provide prisons a nudge toward simple administrative procedures.

To be sure, Congress designed the PLRA to reduce judicial scrutiny of prison procedures. The term "available" is far less restrictive than the requirement that a remedy be "plain, speedy, and effective"—as the predecessor statute, the Civil Rights of Institutionalized Persons Act, required. See Pet'r Br. 37-38. But the dispute here is not whether the PLRA *reduced* judicial scrutiny of prison administrative remedies—it is whether the PLRA *eliminated* it altogether.[21]

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[21] An objectively reasonable prisoner may understand which administrative procedure to use and how to use it, even though that procedure would not have qualified as "plain, speedy, and effective" under the now-displaced CRIPA regime. See *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Under CRIPA, courts went so far as to dictate specific administrative procedures that prisons had to adopt in order to benefit from exhaustion, even ordering prison administrators "to draft policy directives." *Knop* v. *Johnson*, 977 F.2d 996, 1010 (6th Cir. 1992). Our interpretation of

Congress did not intend to eliminate *all* judicial scrutiny of prison grievance procedures. If it had wanted to do so, Congress would not have used the word "available" in Section 1997e(a). Congress could have, for example, precluded federal prison litigation wholesale *whenever* a prison had an internal grievance process. Congress, moreover, could have required a prisoner to exhaust "*all* remedies" or "*any* remedies." It did none of these things. It instead limited exhaustion to "available" remedies.

With the PLRA, Congress intended to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones*, 549 U.S. at 203. Congress thus wished to "facilitate consideration of the good" prisoner suits. *Id.* at 204. During the PLRA floor debate, legislators repeatedly emphasized that the exhaustion provision was targeted at *frivolous* suits, not meritorious ones. See, *e.g.*, 141 Cong. Rec. 14571 (1995) (statement of Sen. Bob Dole) (purpose of PLRA to "curtail frivolous prisoner litigation"); 141 Cong. Rec. 27042 (1995) (statement of Sen. Orrin Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); 141 Cong. Rec. 27044 (1995) (statement of Sen. Strom Thurmond) ("This amendment will allow meritorious claims to be filed.").

Thus, in interpreting the PLRA, this Court "presume[s] that Congress was sensitive to the real-world problems faced by those who would remedy constitutional violations in the prisons and that Con-

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the term "available" thus does not conflict with the PLRA's elimination of the "plain, speedy, and effective" language from Section 1997e(a).

gress did not leave prisoners without a remedy for violations of their constitutional rights." *Brown* v. *Plata*, 131 S. Ct. 1910, 1937 (2011). "Prison walls," after all, "do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* v. *Safley*, 482 U.S. 78, 84 (1987).

For these reasons, the position of the *amici* States is difficult to understand. Their principal contention is that "existing prison grievance procedures are designed to be simple and accessible for inmates." States *Amicus* Br. 3. They catalog the policies of multiple states, concluding that they satisfy this goal of being "simple and accessible for inmates." *Id.* at 25. In states where that is so, the administrative remedies are "available" under our definition. The issue posed here will never matter.

It is, of course, commendable that many *amici* States have such clear procedures. But perplexing policies are known to exist. In Connecticut, for example, one inmate grievance form stated that a complaint regarding "'[h]ealth services diagnosis or treatment'" is "'not grievable.'" *O'Donnell* v. *State*, 2004 WL 2222926, at *5 (Conn. Sup'r Ct. 2004). Elsewhere, the same form said that "'[a]ll health care related grievances shall be placed in a box designated for health services grievances and shall be processed by the designated Health Services Grievance Coordinator.'" *Ibid.* It was, a court found, "difficult to make sense of this." *Ibid.* The court ultimately rejected the exhaustion defense because "the regulations involved are confusing and difficult to understand regarding the issue of whether the grievance procedure is available." *Id.* at *6.

And, as we have shown with respect to Maryland, the procedures that prisoners were required to

follow to exhaust their claims when the IIU was investigating were simply unknowable. Indeed, "in many jails and prisons, administrative remedies are, unfortunately, very difficult to access," and prisoners "operat[e] under rules * * * [that] are often far from clear." Schlanger & Shay, *supra*, at 147-148. Given that prisoners "generally are untrained in the law and are often poorly educated" (*Woodford*, 548 U.S. at 103), the net effect of such complication is that prisoners—even those with meritorious claims—will be barred from court because of overly ambiguous prison rules.

With the PLRA, Congress ended judicial micromanagement of prison administrative remedies, but it expressly kept an outer boundary beyond which a remedy would cease to be "available." All courts of appeals to have considered this issue agree. Petitioner would wipe this away. He would invite every prison across the country to play "hide-and-seek with administrative remedies." *Goebert*, 510 F.3d at 1323. While "the Queen [of Hearts] would be proud" (*ibid.*), Congress would not.

2. Our interpretation of the term "available" also comports with Congress's interest in decreasing the quantity, but increasing the quality, of prisoner lawsuits. See Pet'r Br. 5, 36-37. The exhaustion requirement is designed, in substantial part, to aid courts in identifying meritorious prison claims. *Jones*, 549 U.S. at 213.

For an administrative procedure to advance this purpose of sorting good from bad, it must make it fairly possible for a prisoner to present the merits of the grievance. If an administrative procedure is so complex that a prisoner is left to guesswork, it will

filter out claims at random. A roulette wheel would serve the same purpose.

Petitioner fears that a decision adverse to him "would eviscerate the PLRA's mandatory exhaustion requirement" and "undermine[] all of the[] advantages that Congress sought to achieve" in the PLRA. Pet'r Br. 41-42. He can make these claims only by closing his eyes to what the term "available" means. If a prison creates a system that is *actually* "simple and accessible" (States *Amicus* Br. 25)—both on paper and in practice—it will have every benefit of the exhaustion defense. Here, 39 States have signed an *amicus* brief asserting that this describes their *current* administrative procedures; no state, except perhaps Maryland, suggests that this is too tall an order.

D. Because an objectively reasonable prisoner would not have understood how to pursue respondent's claim, no remedy was "available."

Recognition that respondent *correctly* navigated Maryland's grievance procedure resolves this case. Assuming, for sake of argument, that we were wrong on that score, the administrative procedure that respondent supposedly should have used would not qualify as "available" because no objectively reasonable prisoner would have known to use it.

1. We have carefully examined the Maryland grievance system, and, as we have described, our findings show that, when an IIU investigation was underway, the relevant authorities charged with administering the prison grievance system routinely dismissed both ARP complaints and direct IGO complaints as procedurally improper. See, *supra*, pages

15-30. Against this backdrop, petitioner cannot seriously maintain that an objectively reasonable prisoner would have understood that he had to use one of these procedures (much less *which* of the two) in parallel with an IIU investigation. See Pet'r Br. 49-52.

On the one hand, if the prison administrators were *correct* when they dismissed prisoner grievances because of a parallel IIU investigation, then it follows that no administrative remedy was "available" to respondent at all. In our view, the prison administrators *were* correct: not only were the administrators best positioned to know how the system actually operated, but their approach accorded with the IIU's exclusivity regulation. If this is so, then petitioner (represented by the Attorney General himself) is wrong. If even the Maryland Attorney General has trouble navigating the relevant administrative procedures, an objectively reasonable prisoner would be all at sea.

On the other hand, if (contrary to fact) *petitioner* is correct, and the presence of an IIU investigation did not bar an ARP or an IGO complaint, then these *prison administrators* were wrong when they dismissed prisoner grievances on this basis. Under that scenario, the result would be troubling: the very individuals *charged with administering the grievance system* did not know how the procedures actually worked. It is difficult to conceive of more telling evidence that the system was indecipherable.

Petitioner criticizes respondent for not studying the prison handbook, asserting that this "reason alone" forecloses his claim. Pet'r Br. 49-50. But what good would the handbook have done? As petitioner explains (*id.* at 7), the handbook instructed inmates

to file an ARP—but, in actuality, that remedy was decidedly *un*available. See, *supra*, pages 15-24. And even aside from that, the handbook did not inform inmates that they should file complaints directly with the IGO, but petitioner now faults respondent for not doing exactly that. See, *supra*, pages 24-25.

Petitioner's argument with respect to the handbook is also flawed as a matter of law. We do not disagree that, in assessing whether an objectively reasonable prisoner would understand which procedure to use with respect to a particular claim, the contents of a prison handbook are relevant. But the proper test is objective: the administrative remedy is either "available" for all prisoners in respondent's circumstances, or it is "available" to none of them. Whether an individual plaintiff actually read the prison handbook, therefore, is entirely beside the point. No one suggests that federal courts should engage in a case-by-case examination of whether a particular prisoner did sufficient due diligence to have been *subjectively* reasonable.[22]

The relevant inquiry is easily answered in the circumstances of this case. An objectively reasonable prisoner in respondent's shoes could do no better than to guess at whether he should pursue a claim via the ARP, the IGO, the IIU, or some combination

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[22] For this reason, petitioner's criticism of the court of appeals for not addressing whether respondent himself read the handbook (Pet'r Br. 50) and for making a "counterfactual assumption" (*id.* at 51) widely misses the mark. The court of appeals engaged in a run-of-the-mill objective reasonableness analysis, examining the facts as they actually existed, not as respondent subjectively perceived them. See *Heien* v. *N. Carolina*, 135 S. Ct. 530, 539 (2014).

of the three. As a result, no administrative remedy can be fairly described as "available."

2. Because this test is objective, we do not contend that a prisoner can point to an internal prison investigation as proof that he, as a subjective matter, was confused about which administrative procedure he should have used. Cf. Pet'r Br. 52-54. If a state permits a prisoner to pursue an administrative procedure that is parallel to a prison disciplinary investigation—and its policies in this regard are clear—the mere fact that the prison conducted an investigation is no basis to conclude that the administrative remedy was unavailable. Those are not, however, the facts of this case.[23]

* * *

The PLRA's use of the term "available" requires that a prison's administrative remedy have a minimal degree of clarity; an objectively reasonable prisoner must be able to understand which procedure to

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[23] In any event, a thorough investigation occurred here. The prison conducted a year-long investigation, resulting in a lengthy report with substantial factual findings, and the prison effectively fired Madigan. See JA 186-265. The prison warden substantiated respondent's key contention that the "use of force was unnecessary[,] therefore it was excessive." CA4 JA 56. Petitioner is thus wrong to say that "the prison had no opportunity to resolve any of [respondent's] claims for relief before he filed this suit." Pet'r Br. 54. Indeed, the prison could have offered respondent a settlement, along with a liability release—it just never did so.

Petitioner's more limited contention is that the investigation did not specifically address Ross's culpability. Pet'r Br. 54-55. But that simply isn't so. The investigation considered the conduct of Ross at great length (JA 192-193, 201-202, 203-204, 205-206, 207, 212, 214, 219-220, 221-223, 227-230, 241-242, 247-248) and took a witness statement from him (JA 198, 216-218).

use and how to use it. According to the 39 States that appear as *amici*, their prison administrative remedies easily satisfy this requirement: their "existing prison grievance procedures are currently designed to be simple and accessible for inmates." States *Amicus* Br. 25. This is, of course, little surprise since the courts of appeals have long held that a remedy is "available" only if a reasonable prisoner can know how to use it.

But the administrative procedure at issue here—how a Maryland prisoner was to exhaust a claim investigated by the IIU, prior to amended Directive 185-003—was anything but clear. Before this Court, the Maryland Attorney General repeatedly mischaracterizes how Maryland's grievance process actually worked. If the administrative procedure is so convoluted that the Maryland Attorney General cannot, even now, accurately and concretely describe what it was that respondent should have done, the remedy was surely too confounding to qualify as "available" as that term is used in the PLRA.[24]

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[24] The court of appeals expressly did "not reach the issue of whether [petitioner] waived" the exhaustion defense. Pet. App. 6. Although respondent advanced this argument in the opposition brief (Opp. Br. 10-14), petitioner does not now address the issue, and we accordingly do not ask the Court to consider the argument. In the event of any remand, that question should remain open for the court of appeals to resolve. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MICHAEL ROSS,

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v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

Choosing not to address the question on which this Court granted certiorari, Mr. Blake's brief instead addresses a different question. Mr. Blake asks this Court to let stand the Fourth Circuit's erroneous adoption of a "reasonable belief" exception to the Prison Litigation Reform Act ("PLRA")'s requirement to exhaust administrative remedies, not because the PLRA allows for such an exception, but because, he contends, evidence not previously introduced in this case demonstrates that Mr. Blake should have prevailed on the alternative ground that no administrative remedies were available to him. For several reasons, this Court should decline.

1. Mr. Blake has effectively conceded that the PLRA does not allow for the Fourth Circuit's "reasonable belief" exception. The district court dismissed Mr. Blake's claim against Lt. Ross on the ground that Mr. Blake had failed to exhaust available administrative remedies. Pet. App. 56-61. The Fourth Circuit reversed on the ground that Mr. Blake did not need to exhaust because a hypothetical prisoner who had read the prison's regulations, directives, and handbook – something Mr. Blake admits he did not do – might have reasonably, though erroneously, believed that his request that the prison initiate an internal investigation was sufficient to exhaust administrative remedies. Pet. App. 12 n.4, 13-15. By declining to defend the grounds on which the Fourth Circuit ruled, Mr. Blake has effectively conceded that court's error.

2. Mr. Blake's proposed interpretation of when an administrative remedy is "available," and thus must be exhausted, lacks merit. Mr. Blake's contention that a remedy is not available if a hypothetical prisoner might have been confused as to procedure finds no support in the PLRA, its legislative history, or case law interpreting it. The cases from other circuits on which Mr. Blake relies stand for the unexceptional proposition that an administrative remedy is not "available" if a prison takes affirmative steps to block a prisoner from having access to it. There is no suggestion of similar conduct in this case. Maryland's administrative remedy procedures, with or without a pending investigation by the Internal Investigation Unit ("IIU"), were "available."

Indeed, Mr. Blake's proposed rule would create an even larger loophole in the PLRA than would the Fourth Circuit's "reasonable belief" exception, both because his rule abandons the "substantive purpose" prong of the Fourth Circuit's exception and because it effectively reinstates the pre-PLRA limitation that exhaustion was required only for remedies that courts found "plain." *See Booth v. Churner*, 532 U.S. 731, 739 (2001).

3. Mr. Blake's proposed alternative ground for relief is based on documents presented for the first time before this Court. Even if this were the proper forum for introducing such evidence – which it is not – the five anecdotal cases on which Mr. Blake relies, all of which focus on the first step of the administrative remedy process, do not support his claims that no

process was available. Moreover, we have located at least thirteen cases, including one of those mistakenly relied upon by Mr. Blake, in which prisoners received administrative hearings – and, in some cases, monetary compensation – by pursuing Maryland's administrative remedy procedures in cases involving IIU investigations.

I. As Respondent Effectively Concedes, the PLRA Does Not Allow for the Fourth Circuit's Reasonable Belief Exception.

1. Mr. Blake effectively concedes that the basis on which the Fourth Circuit ruled lacks support in the PLRA. Rather than defend the Fourth Circuit's reasonable belief exception, Mr. Blake argues that this Court should affirm on the alternative ground that he satisfied all available administrative remedies, Resp. Br. 13-30, 34-57, or dismiss this case as improvidently granted, *id.* 31-34. The closest Mr. Blake comes to defending the Fourth Circuit's rule is to claim that there is no "substantive difference" between the reasonable belief exception and his alternative focus on his novel interpretation of the word "available." Resp. Br. 41. However, elsewhere in his brief, Mr. Blake admits that the Fourth Circuit's rule is really an "extra-textual exception to the PLRA's exhaustion requirement," and he urges this Court to "resort to" the exception only if it does not adopt his "interpretation of the statutory term 'available.'" *Id.* 47-48 n.20.

Mr. Blake's attempt to recast the Fourth Circuit's reasonable belief exception as an examination of availability fails because the exception is necessarily premised on the existence of an available remedy. Pet. App. 10 (explaining that the exception addresses a prisoner's "reasonable, albeit flawed, attempt to comply with the relevant administrative procedures"). Stated differently, an exception to the requirement to exhaust "such administrative remedies as are available," 42 U.S.C. § 1997e(a), makes sense only if administrative remedies *are* available.

2. Mr. Blake's effort to conflate the Fourth Circuit's reasonable belief exception with his interpretation of the term "available" suffers from additional deficiencies. Under the PLRA, all "available" remedies must be exhausted, whether or not they meet federal standards or a court would find them "plain, speedy, and effective." *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth*, 532 U.S. at 739. Congress thus removed from courts the authority to decide whether a remedy is sufficiently "plain" to warrant exhaustion. Pet'r Br. 2-6, 35-44. Regardless of how it is articulated, a rule that allows a prisoner to bypass administrative remedies because a hypothetical, "objectively reasonable prisoner" might misunderstand them, Resp. Br. 35, necessarily conflicts with the clear congressional purpose in making those changes, *see* Pet'r Br. 35-44. Because Mr. Blake's proposed definition of "available" would eviscerate that congressional intent, it must be rejected.

This Court has suggested that exhaustion might not be required where a prison creates "procedural requirements for the purpose of tripping up all but the most skillful prisoners," *Woodford v. Ngo*, 548 U.S. 81, 102-03 (2006), but there is no evidence of that in Maryland's administrative remedy procedures. The possibility that *Woodford* left open is a far cry from both Mr. Blake's proposal and the Fourth Circuit's detailed parsing of Maryland regulations, the prison directives, and the handbook. If this Court is to ascribe meaning, as it must, to Congress's deletion of the requirement that prisoners need exhaust only those remedies that the courts find "plain" and "effective," then it must preclude this level of judicial involvement in, and scrutiny of, a prison's available administrative remedy procedures. *Nyhuis v. Reno*, 204 F.3d 65, 74 (3d Cir. 2000) (stating that elimination of these terms was intended to relieve courts of obligation to evaluate relative merits of prison system's available remedies).

This is not to say that prisons may create requirements to prevent inmates from accessing a remedy. Contrary to Mr. Blake's assertion, Maryland does not argue that a "court can *never* consider whether a prison has adopted administrative procedures that are indecipherable." Resp. Br. 2. But the Fourth Circuit's parsing of Maryland's procedures to seek out any possible basis for confusion on the part of a hypothetical reasonable prisoner differs considerably from asking whether available procedures are "indecipherable." Maryland's procedures and practices are

not close to indecipherable; indeed, as explained below, many inmates alleging improper use of force have used those same procedures in cases involving IIU investigations.

4. The Fourth Circuit erroneously adopted an "objective" standard of "reasonable belief," under which it treats the prisoner's actual belief and knowledge as irrelevant. This exception even excuses an inmate who, like Mr. Blake, deliberately bypasses the prison's administrative remedy procedures. Pet. App. 12 n.4. That standard undermines the centerpiece of the PLRA and is inconsistent with rulings from other circuits and with the very concept of reasonable belief. "As the term itself indicates, reasonable belief" should "involve[ ] both a subjective component and an objective component." *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 811 (6th Cir. 2015); *accord Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008). Even when prison officials make threats to prevent filing of a grievance, courts still consider the actual state of mind or conduct of an inmate. Thus, to be excused from a failure to exhaust, the inmate must establish "both" that (1) he was actually "deter[red] from lodging a grievance or pursuing a particular part of the process"; and (2) under the circumstances, "a reasonable inmate of ordinary firmness and fortitude" would have been so deterred. *Turner v. Burnside*, 541 F.3d 1077, 1085

(11th Cir. 2008); *accord Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011).[1]

In reality, Mr. Blake was not actually confused about whether he needed to exhaust administrative remedies, as he never had any intention of doing so. Both on the day of the incident and a year later, Mr. Blake explicitly disclaimed any intent to go any further with his complaint. J.A. 172, 195, 229-30, 263-65, Pet. App. 24. That type of deliberate choice to "bypass" the administrative process, *Woodford*, 548 U.S. at 102, and then later to bring a claim in court, "is precisely what the PLRA was designed to protect against," *Napier v. Laurel Cnty.*, 636 F.3d 218, 225 (6th Cir. 2011).

Similarly, Mr. Blake was not actually confused by the administrative remedy procedures because he never read them. J.A. 174. Although Mr. Blake asks this Court to ignore this inconvenient fact on the ground that his proposed test is objective, Resp. Br.

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[1] Similarly, where an alleged mistake of fact or law is interposed either as a defense or to excuse the performance of a duty, the law requires *both* (1) an actual mistake *and* (2) a showing that the mistake was objectively reasonable. *See* 1 W. LaFave, *Substantive Criminal Law* § 5.6(a) (2d ed. 2014); *United States v. Martin*, 753 F.3d 485, 493 (4th Cir. 2014) (mistake of fact requires both actual and reasonable belief); *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997) (same). Respondent, in advocating an objective standard that ignores the prisoner's actual state of mind, relies on inapposite precedents involving objective standards established to define duties, guide conduct, or impose liability. Resp. Br. 37.

54-55, this Court should reject his plea. Allowing prisoners to deliberately bypass a prison's remedies is directly contrary to the purposes of the PLRA. *Woodford*, 548 U.S. at 102.

II. THE COURT DID NOT GRANT CERTIORARI TO DETERMINE THE MEANING OF "AVAILABLE" UNDER THE PLRA.

1. Until now, Mr. Blake's argument regarding the availability of administrative remedies was based on the assertion that, contrary to the Department's applicable directives and regulations, he was not required to exhaust *any* administrative remedy because he had requested and cooperated with an IIU investigation. Not until his merits brief to this Court did he attempt to adduce factual support purporting to show that the Department's administrative remedy procedures were not functionally available to him.

Mr. Blake's belated presentation of such information in this Court is particularly inappropriate given the burden of proof that was his responsibility to satisfy in the district court. Courts of appeals have held that, although the defendant has the initial burden to prove that administrative remedies are generally available, the burden then shifts to the plaintiff to show that the remedies were nonetheless effectively unavailable to him. *See, e.g.*, *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015) (once defendants meet initial burden, plaintiff may demonstrate that other factors rendered nominally available

procedure "unavailable as a matter of fact"); *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) ("[T]he burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him."); *Tuckel*, 660 F.3d at 1254 (once defendant proves that plaintiff failed to exhaust, "onus falls on the plaintiff to show that remedies were unavailable to him as a result of intimidation by prison officials"). Having failed to produce evidence to meet this burden below, Mr. Blake is not permitted to do so for the first time in this Court.

The district court determined that Mr. Blake had an available administrative remedy, Pet. App. 40-42, and that Mr. Blake's "only proffered excuse" for failing to exhaust was "his subjective belief" that the IIU investigation "relieved him from this requirement," Pet. App. 41. The Fourth Circuit did not disagree with the district court's conclusion that Mr. Blake had an available remedy, but determined nonetheless that exhaustion was excused because he reasonably could have believed that the IIU investigation satisfied the requirement. Pet. App. 2-3, 14-15. That holding is the question that this Court granted certiorari to address.

Mr. Blake's late-raised functional unavailability claims are not properly before this Court. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (this Court does not, as a general rule, decide issues outside the questions presented by the petition for certiorari). In

his Brief in Opposition, Mr. Blake presented three issues: (1) whether Lt. Ross had waived the defense of failure to exhaust available administrative remedies; (2) whether Mr. Blake had exhausted by "triggering" an internal investigation; and (3) whether, even if he did not properly exhaust, he satisfied the PLRA by causing an investigation that fulfilled the PLRA's substantive purposes. Br. Opp. i.

Mr. Blake did not present any issue regarding *actual* unavailability of an administrative remedy to a prisoner in his circumstances, *id.*, and he contended only that "[his] IIU complaint *did* satisfy his exhaustion obligation as a matter of Maryland law," or, alternatively, that Lt. Ross had failed to prove that it did not. Br. Opp. 14. The Court should reject Mr. Blake's attempt to pose and answer a question that differs significantly from the issues identified in the petition and his brief in opposition. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011) (Court does "not normally consider a separate legal question not raised in the certiorari briefs") (citing Sup. Ct. Rule 15.2).

2. In his newly-raised argument on the meaning of "availability," Mr. Blake relies on inapposite PLRA cases in which courts excused failed attempts to exhaust where prison officials actively interfered with attempts to use the available process.[2] *See, e.g.*,

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[2] "Most reported cases excusing compliance with a grievance system consider situations where an inmate was prevented

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Dillon v. Rogers, 596 F.3d 260 (5th Cir. 2010) (officials made incorrect and unverifiable statements about procedures); *Goebert v. Lee Cnty.*, 510 F.3d 1312 (11th Cir. 2007) (officials hid appeal procedures from inmates); *Dole v. Chandler*, 438 F.3d 804 (7th Cir. 2006) (officials misplaced inmate's timely complaint); *Brown v. Croak*, 312 F.3d 109 (3d Cir. 2002) (officials actively thwarted efforts to exhaust); *cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) (habeas exhaustion "rules reflect an equitable judgment that only where a prisoner is impeded or obstructed will a federal habeas court excuse the prisoner from the usual sanction of default"). The circumstances here differ from those cases in two critical and decisive respects, because there is no evidence that Mr. Blake ever attempted to exhaust and no suggestion that officials interfered with any such attempt.

Mr. Blake also relies on cases that he claims excused a habeas petitioner's failure to exhaust a state court remedy that was so bewildering as to be effectively unavailable. Resp. Br. 45. However, in those cases, the petitioner had made a good faith effort to exhaust state remedies and the Court deemed that pursuing such efforts further would be futile. *See Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971) (citing *Marino v. Ragen*, 332 U.S. 561 (1947)

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from grieving by affirmative action." *Graham v. County of Gloucester*, 668 F. Supp. 2d 734, 738 (E.D. Va. 2009) (citing cases), *aff'd sub nom. Graham v. Gentry*, 413 F. App'x 660 (4th Cir. 2011).

(Rutledge, J., concurring)). Indeed, this Court has interpreted *Wilwording* as essentially establishing a futility exception to habeas exhaustion. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (citing *Wilwording*, 404 U.S. at 250). In light of the PLRA's distinct statutory language and history, however, this Court has already decided that futility is not a valid exception under the PLRA. *Booth*, 532 U.S. at 739, 741 n.6.

Even if there were some ambiguity in Maryland's procedures, that ambiguity would not excuse an inmate from at least trying to exhaust. When a grievance policy "is silent or vague in a particular circumstance, courts must look to see whether the prisoner has attempted to satisfy the requirements of the policy," and a prisoner must make "some affirmative efforts to comply with the administrative procedures." *Napier*, 636 F.3d at 223; *see also Lee v. Willey*, 789 F.3d 673, 677 (6th Cir. 2015); *Ruggiero v. County of Orange*, 467 F.3d 170, 178 (2d Cir. 2006); *Albino v. Baca*, 697 F.3d 1023, 1035 (9th Cir. 2012), *overturned on reh'g en banc on other grounds*, 747 F.3d 1162 (9th Cir 2014) (summarizing cases requiring "a good faith effort on the part of inmates to exhaust a prison's administrative remedies as a prerequisite to finding remedies effectively unavailable").

"An inmate's subjective belief that the procedures were not applicable to [his kind of grievance] 'does not matter' and is not determinative." *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005) (citation omitted). Instead, "[t]he only way to determine if the process

[is] available [is] to try." *Napier*, 636 F.3d at 224 (quotation omitted). But Mr. Blake did not try to use the prison's remedy procedures. *See* Pet'r Br. 8-9, 54 (explaining that an IIU investigation is not an administrative remedy procedure under Maryland law and does not serve the same purposes).

3. Similarly unavailing is Mr. Blake's reliance on habeas and administrative exhaustion case law to support his broad interpretation of "available." A habeas applicant must first exhaust "the remedies available in the courts of the State" before he or she is eligible for habeas relief. 28 U.S.C. § 2254. Most of the habeas cases cited by Mr. Blake stand merely for the principle that an inmate need not file "repetitious applications" if the inmate has already presented his claims once through the entire state court system. *Wilwording*, 404 U.S. at 250 (quoting *Brown v. Allen*, 344 U.S. 443, 449 n.3 (1953)). Thus, habeas exhaustion requires only "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that prisoner who fails to seek discretionary review in state's highest court has failed to exhaust).

These cases do not excuse an inmate from trying to press his or her claims through the entire course of an available remedial procedure; to the contrary, they require exhaustion of "one complete round." *Id.* The PLRA requires exhaustion of "all steps that the agency holds out," *Woodford*, 548 U.S. at 91 (quotation omitted), which necessarily must include any

available appeals. In this case, Mr. Blake never initiated a claim for a remedy, pursued an appeal to the Commissioner, or submitted a claim to the Inmate Grievance Office. Thus, even if these habeas principles were to apply, they would not help Mr. Blake.

4. With respect to administrative exhaustion doctrine, Mr. Blake's argument is deficient for reasons addressed more fully in Lt. Ross's opening brief, none of which Mr. Blake addresses. Pet'r Br. 45-49. Mr. Blake's reliance on *Bowen v. City of New York*, 476 U.S. 467 (1986), reflects a misunderstanding of that case. In *Bowen*, a class of plaintiffs challenged a federal policy that had the effect of denying disability benefits. *Id.* at 469. This Court held that a subset of class members, who were not even aware of the existence of the injurious policy, should not be held to the exhaustion requirement. *Id.* at 482. In claiming support from *Bowen*, however, Mr. Blake confuses the class members' knowledge of the underlying policy, which was the issue in *Bowen*, with knowledge of the procedures in place for seeking a remedy, which is the issue here. Resp. Br. 47. Because Mr. Blake has never claimed that he was unable to complain due to unawareness of his injury, he lacks the ignorance of injury that made failure to exhaust excusable in *Bowen*.[3]

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[3] Similarly mistaken is Mr. Blake's contention, relying on a different part of *Bowen*, that cases involving an exception to administrative exhaustion requirements for "undue prejudice" or "hardship" compel the conclusion that exhaustion is not required

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III. Respondent's Newly Discovered Evidence Regarding "Availability" Is Inappropriate and Inaccurate.

A. The Court Should Decline to Consider Mr. Blake's Newly-Presented Evidence.

Before this Court, Mr. Blake seeks to introduce, for the first time, factual support for his contention that, in 2007, the existence of an IIU investigation precluded all administrative remedies. The district court and the Fourth Circuit relied on the evidence in the record, including applicable regulations, to identify available administrative remedies. Pet. App. 7-8, 11-15, 38-39, 40-42, 56-58. Indeed, the Fourth Circuit's "reasonable belief" exception presupposes the existence of an available remedy. Mr. Blake never introduced contrary evidence below, but now claims that anecdotal records from five cases establish "conclusively" that Maryland prison officials interpreted Maryland regulations to preclude any administrative remedies while an IIU investigation was

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where a remedy may be confusing. Resp. Br. 47; *see also* Resp. Br. 47-48 n.20 (asserting that *Bowen* held that certain litigants need not exhaust administrative remedies if doing so would lead to "irreparable harm"). That is a non sequitur. *Bowen* does not give the federal courts leave to craft ad hoc, equitable exceptions to this exhaustion requirement. Unlike the statutory scheme at issue in *Bowen*, Congress's deletion of the prior "interests of justice" requirement under the pre-PLRA scheme shows that Congress did not intend to allow such exceptions in the PLRA. In any event, there has never been any suggestion of irreparable harm to Mr. Blake if he were to have properly exhausted his administrative remedies.

pending. Resp. Br. 19-26. This Court should decline Mr. Blake's attempts to insulate the Fourth Circuit's legal error from review.

Mr. Blake had an opportunity in the district court to conduct discovery and offer evidence, and he did so. Based on the resulting summary judgment record, the district court determined that administrative remedies were both factually and legally available. Pet. App. 40-42, 56-60. Mr. Blake improperly attempts to reopen that record on appeal. This Court does not consider non-record evidence or resolve new factual disputes. As this Court has long held, appellate courts "can act on no evidence which was not before the court below." *Boone v. Chiles*, 35 U.S. 177, 208 (1836); *see also Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) (emphasizing that appellate court "must affirm or reverse upon the case as it appears in the record").

This Court does not "address for the first time" an issue "which the Court of Appeals has not addressed." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). Nor does it "consider claims that have not been the subject of factual development in earlier proceedings." *Witters*, 474 U.S. at 486 n.3. Thus, this Court should refuse Mr. Blake's invitation to newly determine as a factual matter whether, despite the legal availability of administrative remedies, remedies were functionally unavailable.

B. The Evidence Establishes that an Administrative Remedy Was Available.

Even if this Court were to accept Mr. Blake's invitation to go outside the record, public records confirm that inmates were able to pursue administrative remedies notwithstanding an IIU investigation. Mr. Blake's anecdotal evidence is unavailing both because it does not establish what he claims and because it fails to account for other cases that demonstrate that administrative remedies were available.

In relying on five[4] anecdotal cases as "conclusive" evidence regarding Maryland practice, Mr. Blake errs in at least three ways. First, such anecdotal evidence cannot serve as conclusive evidence of a statewide practice. Second, in focusing on the first stage of a three-stage administrative remedy process, Mr. Blake ignores the broader scope of the available administrative process. Third, his "evidence" disregards a number of cases involving IIU investigations where claims for administrative remedies were presented and successfully pursued.

1. Five individual cases handled at a low level in the Department do not constitute Maryland law. This "anecdotal evidence" is "too weak" to prove that

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[4] Mr. Blake also discusses a number of district court cases, all of which were decided under a different set of directives that went into effect after the events underlying this case. *See* cases cited at Resp. Br. 23 n.9, 27, 28 n.11, 29 nn.12 & 13. None of these cases discuss any pertinent provisions or contain relevant legal analysis. *See* Pet. App. 59-61.

administrative remedies were not available. *Cf.* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, ___, 131 S. Ct. 2541, 2556 (2011) (rejecting reliance on limited anecdotal evidence to prove a larger pattern or practice). Such "anecdotal evidence rarely, if ever, can show a systemic pattern." *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992) (quoting *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991)). At most, Mr. Blake's new evidence indicates that some wardens dismissed initial requests for administrative remedies while an IIU investigation was pending. But the warden was only the first step in the process, and a dismissal of an individual grievance does not establish state law.

2. In focusing exclusively on the initial phase of the process, Mr. Blake ignores the broader context of the administrative remedies that were available to him.

The Inmate Grievance Office was created in 1971 to hear inmates' complaints; it provides the primary administrative remedy for *any* inmate grievance against a correctional officer. *McCullough v. Wittner*, 314 Md. 602, 610 (1989); COMAR § 12.07.01.02B(7) (1994) (defining grievance broadly as "the complaint of any individual in the custody of the Commissioner" arising from "the circumstances of custody or confinement"). If the complaint involves an assault by a correctional officer, the inmate must first exhaust the ARP process as condition precedent to review of his grievance by the Office. This is done by submitting a complaint to the warden, then appealing an adverse

decision to the Commissioner. Md. Code Ann., Corr. Servs. § 10-206(b); Pet. App. 77-78, J.A. 325-26, 368-69. Within 30 days of the Commissioner's decision, the inmate may submit a complaint to the Inmate Grievance Office.

As the directives provide, a procedural dismissal of an ARP complaint is a "substantive decision," to be appealed to the Commissioner and then submitted to the Inmate Grievance Office. J.A. 325-26, 368-69. Such a dismissal and Commissioner's affirmance thus exhaust the ARP process. The procedural dismissals in the five cases identified by Mr. Blake should therefore have been appealed, and then submitted to the Inmate Grievance Office. As shown below, at least one of them was.

Alternatively, if the ARP is not available for a class of grievance, inmates are entitled to submit a grievance directly to the Inmate Grievance Office. As Judge Williams explained, Maryland law "vests primary responsibility for fielding inmate grievances with the" Office, Pet. App. 58, and inmates thus could "file a grievance directly with" that office. Pet. App. 56. *See* Md. Code Ann., Corr. Servs. § 10-206(a); *McCullough*, 314 Md. at 610 (submission of complaint to Office is inmates' primary administrative remedy).

Contrary to Mr. Blake's insinuations, this was not kept secret. The handbook explained that the only complaints that the Inmate Grievance Office would not accept initially were those "that can be handled through the ARP"; for those complaints, the Office

would accept them after the inmate had "filed a [complaint] with the warden and appealed to the Commissioner." Pet. App. 78. As Judge Williams concluded, there was "very little, if any, ambiguity in Maryland's inmate grievance procedures." Pet. App. 42.

Moreover, these procedures were not designed as a trap for the unwary. An inmate who mistakenly submitted an ARP-eligible claim to the Inmate Grievance Office would be told to proceed with the ARP process and, in such a case, normal ARP time limits were "set aside." J.A. 315. Whether through the appeals in the ARP process or directly, an inmate who properly exhausted either process would thus reach the Inmate Grievance Office, which unquestionably has authority to hear grievances despite an IIU investigation. Pet. App. 58-59; *see McCullough*, 314 Md. at 610. As Judge Williams recognized, the IIU regulations "expressly contemplate the contemporaneous conduct of IIU and IGO proceedings." Pet. App. 59 (citing COMAR § 12.11.01.05B).

The only purported authority that Mr. Blake cites for his contrary view is an IIU regulation that requires agency heads to "[r]elinquish authority for an investigation undertaken by the IIU, including an investigation initially assigned to an agency head that is subsequently assumed by the IIU." Resp. Br. 16-17 (citing COMAR § 12.11.01.08B). Mr. Blake never raised that regulation below, and the Fourth Circuit never relied on it, for good reason. The regulation is not part of the provisions governing administrative

remedies and is not referenced in any of the materials provided to prisoners describing the remedy process. Moreover, the IIU regulation applies only to investigations over which the IIU has authority, namely, criminal and serious misconduct investigations for the purpose of determining whether to take disciplinary action or file criminal charges. *See* Md. Code Ann., Corr. Servs. § 10-701(a)(3). The regulation does not apply to administrative remedy procedures to redress a prisoner's grievance.[5]

More to the point, even assuming the regulation were a legislative regulation that required a warden to dismiss an ARP complaint, which it is not, the regulation could not preclude the Inmate Grievance Office from considering a prisoner's claim. An inmate's complaint alleging assault by a correctional officer is "a matter falling within [its] expertise," and exhaustion of that process is a prerequisite to filing a civil action in Maryland state court. *McCullough*, 314 Md. at 610; Md. Code Ann., Cts. & Jud. Proc. §§ 5-1001(c), 5-1003. Moreover, the Inmate Grievance Office's remedy procedure involves an adversarial hearing before an independent administrative judge, not a criminal or misconduct "investigation." Pet. App. 79-80.

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[5] Moreover, COMAR § 12.11.01.08 is an "interpretive" regulation that lacks the force of law and cannot diminish the scope of a prisoner's available administrative remedies. *Building Materials Corp. v. Board of Educ.*, 428 Md. 572, 591 (2012).

3. Mr. Blake now claims, based on five anecdotal cases, that the ARP process was not available in practice during the pendency of an IIU investigation, Resp. Br. 19-23; and, based solely on one anecdotal case, that a direct complaint with the Inmate Grievance Office was also not available, Resp. Br. 25-26. He is incorrect.

Mr. Blake claims that an "exhaustive" search of district court records to identify cases involving both IIU investigations and inmate grievances did not reveal a single case in which the grievance was allowed to proceed. Resp. Br. 18. However, a contrary conclusion emerges from a quick examination of just the cases on which Mr. Blake relies. Although Mr. Blake is correct that the initial ARP claim filed by Austin Gladhill was procedurally dismissed by the warden, Mr. Gladhill appealed that procedural dismissal to the Inmate Grievance Office, which held a hearing on the merits of his complaint as the law requires, Md. Code Ann., Corr. Servs. § 10-207 (Office must hold hearing unless complaint wholly lacks merit on its face). Pet'r Lodging 1-10, 14-16. Mr. Blake's proposed lodging of an excerpt of the Gladhill documents omits the discussion of the role of the Inmate Grievance Office in the case.[6]

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[6] Mr. Blake also errs in relying on Mr. Wilkerson's case as the sole pre-2008 support for his claim that the Inmate Grievance Office would not hear a complaint for which the ARP process was not available. Resp. Br. 25-27. One example cannot establish this purported practice and, in any event, Mr. Blake

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Mr. Gladhill's experience is not unique. Lt. Ross has identified at least twelve other cases in which the underlying events occurred before August 2008 and where the Inmate Grievance held a hearing on the merits of a claim when there had been an IIU investigation.[7] Moreover, although just the existence of hearings in these cases disproves Mr. Blake's claim, eight of these inmates received monetary compensation, in amounts that ranged up to

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mischaracterizes the facts of Mr. Wilkerson's case. Mr. Blake claims that when Mr. Wilkerson filed a grievance with the Inmate Grievance Office, his ARP had already been dismissed. Resp. Br. 26. In reality, Mr. Wilkerson had not yet filed an ARP, and there is no evidence that he explained why he was filing the grievance without exhausting the ARP process. Resp. Lodging 18-19. It thus appears that the Inmate Grievance Office had no grounds to believe an IIU investigation was pending or that the ARP would be dismissed. Even if the Inmate Grievance Office had known that an IIU investigation was pending, its decision to require exhaustion of the ARP would show no more than the expectation of the proper process; an inmate must generally exhaust the ARP, including all appeals, before reaching the office.

[7] In each of these cases, the administrative law judge issued a post-hearing proposed decision on a prisoner's grievance that notes the existence of an IIU investigation. Pet'r Lodging 87, 93, 113, 123, 133, 145, 151, 160, 170, 181, 193, 203, 207, 214, 226. To take just one example, on June 7, 2005, Eric Gwynn appealed the procedural dismissal of his ARP complaint to the Inmate Grievance Office, which set the grievance for a hearing even though there had been an IIU investigation. Pet'r Lodging 93. Given the age of the relevant proceedings, and the lack of any systematic means of tracking such overlapping proceedings, it is likely that there were other similar cases that have not yet been identified.

$100,000.[8] Pet'r Lodging 245-63. Notwithstanding Mr. Blake's professed confusion over regulations he never read, these examples show that meaningful administrative remedies were available and could be successfully pursued under the pre-August 2008 prison directives.[9]

4. That these inmates had their administrative remedy claims presented to the Inmate Grievance Office and heard by an administrative law judge demonstrates that the remedy procedures offered by Maryland were in fact available. Even if Mr. Blake's

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[8] In one of the cases, Kenneth Davis filed an ARP alleging that he had been assaulted by prison staff. Pet'r Lodging 231. Although he claimed that he was told not to file an ARP because an IIU investigation was pending, he followed the prescribed procedures, appealed the procedural dismissal to the Inmate Grievance Office, and received a hearing after which the administrative law judge recommended an award in favor of Davis. Pet'r Lodging 231, 243. The Department and Mr. Davis settled his claim for $100,000. Pet'r Lodging 263. Similarly, the Department settled the seven other cases for monetary awards after an administrative law judge had recommended compensation. Pet'r Lodging 245-63.

[9] As Judge Williams recognized, the same is true under the 2008 amendments. Pet. App. 57-58. Mr. Blake's purportedly "exhaustive" search failed to turn up at least three examples under the 2008 directives where inmates received an Inmate Grievance Office hearing notwithstanding an IIU investigation. Pet'r Lodging 17-24, 32, 37, 39-44, 58-63, 72 (*Dunn v. Parsons*, No. 8:11-cv-01960, Dkt. No. 24-17, Ex. 13 (Nov. 11, 2011); *Diggs v. Balogan*, 8:15-cv-00535, Dkt. No. 1 (D. Md. Feb. 24, 2015); *Brightwell v. Hershberger*, 11-cv-3278, Dkt. No. 141-2, Exs. 3 & 4 (D. Md. Oct 23, 2015)). Mr. Diggs received monetary compensation. Pet'r Lodging 45-46, 53-54.

"reasonable inmate" standard were correct, it was met. Moreover, a *reasonable* inmate in Mr. Blake's position would have attempted to pursue a remedy. Mr. Blake did not, and cannot argue now that his failure to exhaust should be excused because some other hypothetical, diligent prisoner might have been confused. This Court should not rely on his counter-factual and self-serving claims that he surely would have been confused by the procedures if only he had read them.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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Title 12
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

Subtitle 07 INMATE GRIEVANCE OFFICE

Chapter 01 General Regulations

Authority: Correctional Services Article, §10-204, Annotated Code of Maryland

* * *

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Administrative remedy procedure" means the procedure established by the Commissioner for inmate complaint resolution.

(2) "Commissioner" means the Maryland Commissioner of Correction.

(3) "Disciplinary proceeding" means Division of Correction adjustment proceedings and Patuxent Institution disciplinary proceedings.

(4) "Division" means the Maryland Division of Correction.

(5) "Executive Director" means the Executive Director of the Inmate Grievance Office or designee.

(6) "Fair value" means the value of inmate property at the time of the loss, damage, or theft that is the lesser of the:

(a) Actual cost of the property at the time of acquisition, less any amounts attributable to depreciation, wear, use, and other factors which decrease the value of the property; or

(b) Reasonable cost of the property at the time of acquisition, less any amounts attributable to depreciation, wear, use, and other factors which decrease the value of the property.

(7) "Grievance" means the complaint of any individual in the custody of the Commissioner or confined to the Patuxent Institution against any officials or employees of the Division or the Patuxent Institution arising from the circumstances of custody or confinement.

(8) "Grievant" means an inmate in the custody of the Commissioner or confined to the Patuxent Institution who files a grievance with the Office.

(9) "Maryland Tort Claims Act" means the law set forth in State Government Article, §§12-101-12-110, Annotated Code of Maryland.

(10) "Office" means the Inmate Grievance Office.

(11) "Prejudice" means a finding that one or more procedural errors undermine confidence in the outcome of a proceeding; that is, but for the error or

errors there is a reasonable probability that the result would be different. There is always prejudice in the failure to abide by a directive or regulation establishing predisciplinary hearing time constraints.

(12) "Property grievance" means a grievance filed by an inmate that the inmate's personal property has been improperly withheld, lost, damaged, stolen, or destroyed through the negligence or other wrongful act or omission of an employee or official of the Division of Correction or Patuxent Institution.

(13) "Secretary" means the Secretary of Public Safety and Correctional Services.

(14) "Substantial evidence" means such relevant evidence as a reasonable mind could reasonably accept as adequate to support a conclusion without reassessing credibility or substituting judgment.

(15) "Treasurer" means the Maryland State Treasurer's Office.

.03 General Procedures.

A. A State or federal court may refer a complaint or grievance filed with it to the Office for review.

B. The Office shall receive for preliminary review any grievance submitted by a grievant.

C. If a grievance arises out of a disciplinary proceeding, the grievant shall exhaust all institutional

appeal procedures before the submission of the grievance to the Office.

D. To the extent that the administrative remedy procedure applies to a particular grievance, the grievant shall exhaust the administrative remedy procedure before the submission of the grievance to the Office.

E. The Executive Director, when conducting the initial review of a grievance, and the administrative law judge assigned by the Office of Administrative Hearings to consider the grievance, shall construe the grievance liberally in determining whether a cognizable issue is stated. When a grievance is based in whole or in part on an alleged violation of rights secured by the United States Constitution, a determination shall be made concerning compliance with applicable regulations, directives, and procedures in addition to the specific constitutional complaint.

* * *

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No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS, PETITIONER

v.

SHAIDON BLAKE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the statutory exhaustion requirement of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), includes an unwritten exception for "special circumstances" that relieves an inmate of his obligation to exhaust available administrative remedies when it would have been objectively reasonable for him to believe mistakenly that he satisfied exhaustion by participating in an internal investigation.

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In the Supreme Court of the United States

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MICHAEL ROSS, PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question in this case is whether the statutory exhaustion requirement of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), includes an unwritten exception for "special circumstances" that relieves an inmate of his obligation to exhaust available administrative remedies when it would have been objectively reasonable for him to believe mistakenly that he satisfied exhaustion by participating in an internal investigation. The United States has a substantial interest in the resolution of that question. Inmates frequently file suits against the United States, the Bureau of Prisons, or prison officials raising claims related to conditions of confinement in federal correctional institutions. See *Porter* v. *Nussle*, 534 U.S. 516, 524-525 (2002). Under the PLRA, "federal prisoners suing under *Bivens* v. *Six Unknown*

Fed. Narcotics Agents, 403 U.S. 388 (1971), must first exhaust inmate grievance procedures just as state prisoners must exhaust administrative processes" before suing under 42 U.S.C. 1983. *Nussle*, 534 U.S. at 524. Federal regulations detail the grievance process for federal prisoners. *E.g.*, 28 C.F.R. Pt. 542, Subpt. B (Administrative Remedy Program). The United States has participated as amicus curiae in prior cases involving the PLRA's interpretation. See *Coleman* v. *Tollefson*, 135 S. Ct. 1759 (2015); *Woodford* v. *Ngo*, 548 U.S. 81 (2006); *Nussle*, *supra*; *Booth* v. *Churner*, 532 U.S. 731 (2001).

STATUTORY PROVISION INVOLVED

The PLRA's exhaustion provision provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. 1997e(a).

STATEMENT

1. Respondent is an inmate in the Maryland Division of Correction. He alleges that two prison guards, James Madigan and petitioner Michael Ross, subjected him to the use of excessive force. Pet. App. 30.

The underlying incident occurred on June 21, 2007, while the prison guards were escorting respondent from his cell to the segregation unit because of a disciplinary infraction. Pet. App. 3, 30. Petitioner handcuffed respondent's hands behind his back, then held him by the arm and escorted him. *Id.* at 3. Madigan followed. *Ibid.* As they were beginning down a flight

of stairs, Madigan "shoved [respondent] from behind." *Ibid.* Petitioner told Madigan that he had respondent under control. *Ibid.* At the bottom of the stairs, Madigan pushed respondent again then "punched him at least four times in the face in quick succession," paused, then hit him again. *Id.* at 4. During this time, petitioner was holding respondent's arm. *Ibid.*; see J.A. 154-161.

Madigan ordered the hallway officer to mace respondent. Pet. App. 4. She refused. *Ibid.* Petitioner told her to radio for assistance, which she did. *Ibid.* Madigan and petitioner then "took [respondent] to the ground." *Id.* at 31. Petitioner "dropped his knee" on respondent's chest and the officers restrained him until help arrived. *Ibid.* A response team arrived and secured the scene. J.A. 201-202. Respondent initially declined medical treatment, Pet. App. 4, but alleges that the attack worsened nerve damage he had suffered previously, J.A. 16, 28, 146. Petitioner sustained injuries to his knees. J.A. 24.

2. Maryland has a three-step inmate grievance process. Under the "Administrative Remedy Procedure," a prisoner initiates the process by filing a request for an administrative remedy with the warden. Pet. App. 8. At the time of the incident here, prisoners were required to submit such a request within 15 days of the incident or the date the prisoner first learned of it. *Evans* v. *State*, 914 A.2d 25, 69 (Md. 2006) (citing Md. Division of Correction Directive No. 185-101, Change Notice 2-01 (effective Feb. 1, 2001)), cert. denied, 552 U.S. 835 (2007). The warden must respond within 30 days. *Ibid.* If the warden denies the request, the prisoner can appeal to the Commissioner of Correction, and again to the Inmate Griev-

ance Office, before proceeding to court. Pet. App. 8. The Administrative Remedy Procedure is available for "all types of complaints," subject to four narrow exceptions. *Id.* at 77. None applies here. *Id.* at 17 (Agee, J., dissenting). Agency directives provide that inmates otherwise must use the Administrative Remedy Procedure for any "institutionally related" complaints, and that "[e]very inmate" may submit such a request. J.A. 312-313 (Md. Division of Correction Directive No. 185-002 (Feb. 15, 2005)). In cases where the Administrative Remedy Procedure is unavailable, inmates can file a grievance directly with the Inmate Grievance Office within 30 days of the underlying incident. Pet. App. 58-59. These procedures allow various forms of relief, including "compensation." See J.A. 320 (defining "relief" to include "compensation"); Md. Code Regs. 12.07.01.10(D) (2005) ("monetary damages" available via the Inmate Grievance Office).

It is undisputed that respondent never filed a request for a remedy under the Administrative Remedy Procedure or a grievance directly with the Inmate Grievance Office. Pet. App. 57; see *id.* at 39-40. Instead, respondent reported the incident to a senior correctional officer, Captain Calvin Vincent, who notified the Correctional Service's Internal Investigative Unit. *Id.* at 4; J.A. 191, 203-204. Vincent's own preliminary investigation found that Madigan had used excessive force and had improperly failed to heed petitioner's statements that he "had the inmate under control." J.A. 204. Vincent then submitted a criminal investigation report with the Internal Investigative Unit, identifying Madigan as the only suspect. J.A. 186-190. An investigation was conducted, and respondent provided a witness statement. Pet. App. 31;

see J.A. 228-230. The investigator's final report found that Madigan had engaged in conduct unbecoming of an officer by assaulting respondent while he was handcuffed from behind. Pet. App. 4-5; see J.A. 191-195 (reproducing the final report). Madigan resigned in lieu of being fired, Pet. App. 32, and the internal investigator recommended that the case be closed with no further action. J.A. 195. The report did not make any findings as to whether petitioner had engaged in wrongdoing, and did not recommend him for any disciplinary action. See J.A. 191-195.

Respondent has explained that he never filed any request for an administrative remedy because "[t]he warden instantly jumped in and involved himself" and "got an investigation going." J.A. 173-174. Respondent did not read the regulations governing the Administrative Remedy Procedure and the Inmate Grievance Office, or seek information about the relationship between the grievance process and the internal investigation. *Ibid.*

3. On September 8, 2009, respondent sued Madigan, petitioner, and several other defendants under 42 U.S.C. 1983. Pet. App. 32. Petitioner raised exhaustion as an affirmative defense, and the district court dismissed respondent's suit against him on that basis. *Id.* at 55-61.[1] The district court held that respondent

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[1] Petitioner did not raise exhaustion in his initial answer. Respondent consented, however, to the filing of an amended answer on the condition that petitioner consent to the filing of an amended complaint. Pet. App. 5. Petitioner invoked exhaustion in that amended answer. *Id.* at 5-6. The district court denied a motion by respondent to strike the exhaustion defense on the grounds that it had been waived. *Id.* at 51-55. Respondent subsequently filed an amended complaint, and petitioner reasserted exhaustion in his answer to the amended complaint. *Ibid.*

could have filed a grievance under Maryland law, but that he had failed to do so. *Id.* at 56-59. It accordingly dismissed, explaining that "'there is no doubt that the PLRA's exhaustion requirement is mandatory.'" *Id.* at 55 (citation omitted).

Madigan failed to raise exhaustion as a defense, Pet. App. 35-36, and respondent prevailed after a jury trial, obtaining a judgment for $50,000 in damages. J.A. 299. All other defendants were dismissed. Pet. App. 30. Those judgments are no longer at issue in this case.

4. Respondent appealed the district court's grant of summary judgment to petitioner, and the court of appeals reversed and remanded. Pet. App. 1-16. The court of appeals did not disagree that respondent had failed to exhaust administrative remedies that were available to him. See *id.* at 9-10. The court of appeals instead held that respondent's failure to exhaust was "justified" on the grounds of a "special circumstances" exception. *Id.* at 9 (quoting *Giano* v. *Goord*, 380 F.3d 670, 676 (2d Cir. 2004)). Specifically, the court held that (1) "the prisoner was justified in believing that his complaints in the disciplinary appeal *procedurally* exhausted his administrative remedies because the prison's remedial system was confusing," and (2) "the prisoner's submissions in the [internal investigation] process exhausted his remedies *in a substantive sense* by affording corrections officials time and opportunity to address complaints internally." *Id.* at 10 (quoting *Macias* v. *Zenk*, 495 F.3d 37, 43 (2d Cir. 2007)).

The court of appeals recognized that respondent had not examined the regulations or the prisoner handbook. Pet. App. 12 n.4. But it reasoned that his subjective knowledge was irrelevant. Instead, the

pertinent inquiry was whether it would have been "objectively reasonable" for a prisoner to mistakenly believe that he had exhausted. *Ibid.* The court also concluded that the internal investigation "satisfied the substantive component of the exception." *Id.* at 11. It reasoned that the Internal Investigation Unit conducted a year-long investigation culminating in a report, and that Madigan chose to resign rather than face dismissal. *Ibid.*

Judge Agee dissented. Pet. App. 16-28. He stated that "[j]udge-made exceptions may be permissible when interpreting judge-made exhaustion doctrines, but they hardly seem appropriate where, as here, we are dealing with Congressional text." *Id.* at 21 (citation omitted). He also stated that "substantial compliance and proper exhaustion are not the same," and that a reasonable-belief exception "is substantial compliance by another name." *Id.* at 20-21. Judge Agee further concluded that respondent had failed to meet even the majority's standard for application of a "new reasonable-interpretation exception." *Id.* at 22; see *id.* at 23-27.

SUMMARY OF ARGUMENT

Respondent's suit should have been dismissed because he failed to properly exhaust administrative remedies that were available to him. The PLRA requires *proper* exhaustion of available remedies, meaning that a prisoner must (1) "'us[e] all steps that the agency holds out'"; and (2) do so in "compliance with [the] agency's deadlines and other critical procedural rules." *Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006) (citation omitted). Respondent has fulfilled neither requirement. Respondent could have filed a request for an administrative remedy, but never did, and that is

due solely to his own mistake or ignorance. The PLRA's exhaustion provision therefore bars this case.

The PLRA does not permit courts to create a new, unwritten exception to excuse a failure to exhaust under "special circumstances." Not only does this exception lack any textual basis, but also *Woodford* forecloses it: A prisoner's failure to pursue a prison's available procedures for providing an administrative remedy constitutes a failure to exhaust *properly*. Moreover, *Woodford* rejected the notion that a prisoner could sue notwithstanding a failure to exhaust properly, provided that the failure was not "deliberate" but instead was the result of a mistake. See 548 U.S. at 97-98. The court of appeals' "reasonable mistake" approach would essentially restore the nontextual pre-*Woodford* exception that *Woodford* disallowed.

The court of appeals' approach is also fundamentally inconsistent with the PLRA's text, history, and purpose. Congress made the PLRA's exhaustion requirement mandatory to replace a dysfunctional scheme under which, among other things, courts had discretion to excuse a failure to exhaust when they believed it would be "appropriate and in the interests of justice" and exhaustion was never required if a court concluded that a prison's procedures were not "plain." *Woodford*, 548 U.S. at 84-85 (citations omitted). Creating a new, unwritten exception for "special circumstances" effectively restores the freewheeling discretion that Congress eliminated. And the conclusion that "special circumstances" exist when procedures are "confusing" and subject to reasonable debate effectively restores the now-defunct requirement that prison regulations be "plain."

To be sure, the PLRA is primarily designed to stop the "disruptive tide of frivolous prisoner litigation," *Woodford*, 548 U.S. at 97, and the internal investigation here confirms that respondent's claims are not frivolous: the internal investigation here concluded that another officer wrongfully assaulted respondent. Indeed, respondent has since won a money judgment of $50,000 against that officer. But the internal investigation conducted here had a different focus than a request for an administrative remedy would have had: It did not focus on the extent of respondent's injuries, did not focus on whether petitioner's conduct was wrongful, and did not ask whether respondent should be given damages or any other kind of remedy. More fundamentally, the PLRA does not include an exception for unexhausted claims that are potentially meritorious. And "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). The court of appeals below disregarded the PLRA's express mandate, and this Court should reverse.

ARGUMENT

A. The PLRA Requires Proper Exhaustion Of Available Administrative Remedies.

Before filing suit to challenge prison conditions under federal law, a prisoner must properly exhaust available administrative remedies. The PLRA provides that "[n]o action" may be brought by a prisoner under federal law "with respect to prison conditions * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). The text

contains only one exception: A prisoner need not exhaust remedies unless they are "available." *Ibid.* Exhaustion of available remedies under the PLRA is "mandatory" and "required for any suit challenging prison conditions." *Woodford* v. *Ngo*, 548 U.S. 81, 85 (2006); accord *Jones* v. *Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA."); *Porter* v. *Nussle*, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life."). Nor will "exhaustion *simpliciter*" suffice. *Woodford*, 548 U.S. at 88, 93. The PLRA's mandate is *proper* exhaustion of available remedies. *Id.* at 84. That means that a prisoner must not merely use all available steps the agency holds out, he must do so in compliance with the agency's "deadlines and other critical procedural rules." *Id.* at 90.[2]

The PLRA's history underscores that Congress deliberately required proper exhaustion of available administrative remedies in all cases. "Congress enacted the [PLRA] in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts," and the PLRA's "invigorated" exhaustion provision is "[a] centerpiece of the PLRA's effort to reduce the quantity of prisoner suits." *Woodford*, 548 U.S. at 84 (quoting *Nussle*, 534 U.S. at 524) (citation and alterations omitted). Before 1980, prisoners asserting constitutional claims in federal courts had no obligation to

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[2] In contexts that are not relevant here, federal law mandates that agency procedures meet certain criteria. For example, under regulations implementing the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972, prison regulations "shall not impose a time limit" on the filing of grievances regarding an allegation of sexual abuse. 28 C.F.R. 115.52(b)(1).

exhaust administrative remedies. See *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam). In 1980, Congress enacted a "weak exhaustion provision" under the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349. *Woodford*, 548 U.S. at 84. Exhaustion under CRIPA was "in large part discretionary." *Nussle*, 534 U.S. at 523. Specifically, CRIPA's exhaustion provision authorized district courts to stay a state prisoner's suit under Section 1983 for up to 90 days to require the prisoner to exhaust "such plain, speedy, and effective administrative remedies as are available," and only if those remedies met federal standards and "the court believe[d] that [requiring exhaustion] would be appropriate and in the interests of justice." CRIPA § 7(a), 94 Stat. 352.

CRIPA failed to stem the overwhelming flow of prisoner suits, and Congress responded with the PLRA to "bring this litigation under control." *Woodford*, 548 U.S. at 84. In particular, the PLRA's exhaustion provision "differs markedly" from the prior scheme. *Nussle*, 534 U.S. at 524. "Exhaustion is no longer left to the discretion of the district court." *Woodford*, 548 U.S. at 85. "All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'" *Nussle*, 534 U.S. at 524. The PLRA thus makes exhaustion mandatory by "eliminat[ing] * * * the discretion to dispense with administrative exhaustion." *Booth* v. *Churner*, 532 U.S. 731, 739 (2001).

This Court has repeatedly rejected efforts by lower courts to create unwritten, discretionary exceptions to the PLRA's mandate. For example, under CRIPA's

"efficacy" exception, prisoners were not required to exhaust when they sought only money damages but the relevant administrative scheme could not provide money damages. See *McCarthy* v. *Madigan*, 503 U.S. 140, 150-151 (1992). Notwithstanding that the PLRA eliminated the "efficacy" exception, some lower courts held that it retained *Madigan*'s rule. They reasoned that the PLRA codified common-law exhaustion doctrine and thus implicitly included the well-settled "futility" exception. See *Nyhuis* v. *Reno*, 204 F.3d 65, 69 (3d Cir. 2000) (describing caselaw). This Court unanimously rejected that view, holding that Congress's elimination of the "efficacy" exception mandated exhaustion without regard to *Madigan*. *Booth*, 532 U.S. at 734. This Court explained that "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6.

Similarly, in *Woodford*, this Court confirmed that the PLRA does not include an exception for constitutional claims. See 548 U.S. at 91-92 n.2. "[W]e fail to see how such a carve-out would serve Congress' purpose of addressing a flood of prisoner litigation in the federal courts * * * when the overwhelming majority of prisoner civil rights and prison condition suits are based on the Constitution." *Ibid.* And in *Nussle*, this Court held that the PLRA does not contain an exception for excessive-force claims. 534 U.S. at 532 ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life.").

To be sure, the Court's decisions also make clear that "Congress framed and adopted" the PLRA's exhaustion provision with "administrative law in mind." *Woodford*, 548 U.S. at 102. But both *Booth*

and *Woodford* illustrate that courts do not have the same flexibility in assessing exhaustion under the PLRA that they would have in evaluating exhaustion under administrative law. And for good reason. "Most applications of the [exhaustion] doctrine [in administrative law] are based on common law reasoning." 2 Richard J. Pierce, Jr. *Administrative Law Treatise* § 15.3, at 1241 (5th ed. 2010) (Pierce). But the PLRA is statutory. "Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," *Patsy* v. *Board of Regents*, 457 U.S. 496, 501 (1982), and a "court may not disregard [such] requirements at its discretion," *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 31 (1989). It is accordingly well-settled that, "[w]hile the common law duty to exhaust administrative remedies is flexible and subject to pragmatic exceptions, a duty to exhaust administrative remedies that is imposed by a statute is mandatory. A court has no discretion to excuse a petitioner from complying with a statutorily imposed duty to exhaust." Pierce § 15.3, at 1241; see *id.* at 1263 ("Judges cannot excuse a petitioner from its duty to exhaust a remedy that is made mandatory by a statute.").[3]

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[3] In certain narrow circumstances, courts have waived "some (but not all) of the procedural steps" required for exhaustion of Medicare disputes under 42 U.S.C. 405(g), which would otherwise brook no exceptions whatsoever. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15, 24 (2000); see Pierce § 15.3, at 1241, 1246-1255. The PLRA's text and context are different, and in any event respondent did not satisfy threshold requirements under *Illinois Council*: Among others, he did not (1) "present [his] claim [for relief] to the agency before raising it in court"; or (2) raise a claim in court that is "collateral" to the claim before the agency. *Illinois Council*, 529 U.S. at 15, 24.

The absence of unwritten exceptions to the PLRA's exhaustion requirement is also consistent with the PLRA's purposes. Congress enacted the PLRA to advance two principal goals: First, "to eliminate unwarranted federal-court interference with the administration of prisons," thereby "'affor[ding] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case,'" *Woodford*, 548 U.S. at 93 (quoting *Nussle*, 534 U.S. at 525); and second, "'to reduce the quantity and improve the quality of prisoner suits.'" *Id.* at 94 (quoting *Nussle*, 534 U.S. at 524).

Like the requirement that exhaustion be "proper" that was at issue in *Woodford*, the requirement that exhaustion is mandatory rather than subject to judicial discretion advances these statutory goals. Mandatory exhaustion "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors." *Woodford*, 548 U.S. at 94. It "reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court." *Ibid.* And, it "improves the quality of those prisoner suits that are eventually filed," because it allows for the creation of an administrative record "while memories are still fresh" and when "evidence can be gathered and preserved." *Id.* at 95.

In short, the PLRA's text, history, caselaw, and purpose all confirm that a prisoner must properly exhaust available administrative remedies.

B. The PLRA Does Not Contain An Unwritten "Special Circumstances" Exception

Against that backdrop, the court of appeals erred in creating its unwritten "special circumstances" exception.

1. The PLRA prohibits courts from creating a freewheeling exception for whatever circumstances they deem to be "special." Such an approach has no basis in the statutory text, and "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). Moreover, creating such an unwritten exception is particularly inappropriate here, because Congress expressly provided that a prisoner need not exhaust when remedies are not "available." 42 U.S.C. 1997e(a). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1953 (2013) (citation omitted).

The PLRA's history and context confirm that it does not contain a "special circumstances" exception. That approach would effectively resurrect the pre-PLRA scheme under which courts had discretion to excuse a failure to exhaust whenever "the court believe[d]" that exhaustion was not "appropriate and in the interests of justice." CRIPA § 7(a), 94 Stat. 352. That discretion "is now a thing of the past." *Booth*, 532 U.S. at 739. Congress pointedly eliminated that broad discretionary exception and replaced it with a mandate that prisoners properly exhaust available

administrative remedies. *Ibid*; see, *e.g.*, *Nussle*, 534 U.S. at 524 ("[E]xhaustion in cases covered by § 1997e(a) is now mandatory."). And "[j]udges cannot excuse a petitioner from its duty to exhaust a remedy that is made mandatory by a statute." Pierce § 15.3, at 1264.

2. a. The court of appeals' "special circumstances" exception fares no better if, as the court of appeals suggested, it is limited to situations where it would have been objectively reasonable for the prisoner to believe that participation in an internal investigation satisfied the exhaustion requirement. See Pet. App. 9-10. This "reasonable mistake" exception similarly lacks support in the PLRA's text, history, and context. Moreover, *Woodford* forecloses it: *Woodford* requires proper exhaustion of available administrative remedies, and the premise of the court of appeals' decision is that respondent did not properly exhaust.

Indeed, the departure from *Woodford* runs deeper, as the court of appeals' approach is materially identical to the "exhaustion *simpliciter*" doctrine that *Woodford* rejected. In *Woodford*, this Court held that the PLRA does not permit a prisoner to sue as soon as administrative remedies became unavailable, if those remedies became unavailable because the prisoner failed to comply with the prison's deadlines. See 548 U.S. at 88. Notably, the lower courts that had adopted this "exhaustion *simpliciter*" theory added a twist: a prisoner could not sue in federal court if he "deliberately" bypassed a prison's available procedures, but could sue if it was "debatable" whether he had exhausted and the prisoner "gave the prison grievance process a chance to work." *Id.* at 97 (citing *Ngo* v. *Woodford*, 403 F.3d 620, 629 (9th Cir. 2005) (*Ngo*),

rev'd, 548 U.S. 81 (2006)); *Ngo*, 403 F.3d at 629. This Court stated that this "interpretation neither has a statutory basis nor refers to a concept of exhaustion from an existing body of law." *Woodford*, 548 U.S. at 98.

The court of appeals' approach here is materially identical. There is no apparent difference between saying (as the court of appeals did here) that a failure to exhaust can be excused when the meaning of prison grievance procedures is subject to "reasonable" disagreement, Pet. App. 10, and saying (as lower courts did before *Woodford*) that a failure to exhaust can be excused when their meaning is "debatable," *Ngo*, 403 F.3d at 629. And there is likewise no real difference between saying (as the court of appeals did here) that proper exhaustion is unnecessary when the prisoner has "afford[ed] corrections officials time and opportunity to address complaints internally," Pet. App. 10, and saying (as lower courts did before *Woodford*) that it is unnecessary when the grievance process has had a "chance to work," *Ngo*, 403 F.3d at 629. *Woodford* equally forecloses both approaches.

b. General administrative law principles provide no basis for the court of appeals' "special circumstances" exception. As noted, although "Congress framed and adopted" the PLRA's exhaustion provision with "administrative law in mind," *Woodford*, 548 U.S. at 102, courts evaluating exhaustion under the PLRA lack the flexibility they might have under administrative law. See pp. 12-13, *supra*.

Relying on a concurrence in the judgment in *Woodford*, the court of appeals interpreted the PLRA to include a "reasonable mistake" exception that is believed was grounded in "well-settled" administrative

law. Pet. App. 9. But this was doubly wrong. First, the Court in *Woodford* disagreed with the concurrence's approach towards implying exceptions into the PLRA, and indeed rejected the view that the PLRA incorporates the administrative-law exception for constitutional claims. *Woodford*, 548 U.S. at 91-92 n.2. That ruling is binding.

Second, the court of appeals' "reasonable mistake" exception is not among the well-settled exceptions to exhaustion under administrative law. See *Woodford*, 548 U.S. at 98 (materially identical approach does "no[t] refer[] to a concept of exhaustion from an existing body of law"). For example, Justice Breyer's concurrence in *Woodford* listed numerous "well-established" exceptions, but did not mention any exception akin to the "reasonable mistake" exception adopted by the court of appeals. See 548 U.S. at 103-104 (noting exceptions in the case law for constitutional claims, futility, hardship, and inadequate or unavailable remedies); see, *e.g.*, *Sims* v. *Apfel*, 530 U.S. 103, 115 (2000) (Breyer, J., dissenting) (similar); *Kentucky* v. *U.S. ex rel. Hagel*, 759 F.3d 588, 599 (6th Cir. 2014) (similar); *Dawson Farms, LLC* v. *Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007) (similar); *Ace Prop. & Cas. Ins. Co.* v. *Federal Crop Ins. Corp.*, 440 F.3d 992, 1000 (8th Cir. 2006) (similar); *Avocados Plus Inc.* v. *Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (similar); *Gonzalez* v. *O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004) (similar); Pierce § 15.2, at 1219-1241 (discussing exceptions).

Nor does caselaw from other circuits support the court of appeals' effort to ground its decision in administrative law. The court of appeals adopted the Second Circuit's "special circumstances" exception to

the PLRA, see Pet. App. 9-10, but it did not rest that exception on general administrative law principles. The Second Circuit first hinted at such an exception in *Berry* v. *Kerik*, 366 F.3d 85 (2004), when it asserted—without discussing administrative law—that although dismissal for failure to exhaust under the PLRA should ordinarily be without prejudice, dismissal should be with prejudice where a prisoner had "ample opportunity" to comply and "no special circumstances justified failure to exhaust." *Id.* at 88. In *Rodriguez* v. *Westchester County Jail Correctional Dep't*, 372 F.3d 485 (2004), the Second Circuit extended *Berry* to justify a prisoner's failure to exhaust on the basis of a reasonable mistake—again without discussing administrative law. *Id.* at 487. Subsequent "special circumstances" cases in the Second Circuit simply rely on circuit precedent. *E.g.*, *Macias* v. *Zenk*, 495 F.3d 37, 41 (2007); *Giano* v. *Goord*, 380 F.3d 670, 675 (2004); *Hemphill* v. *New York*, 380 F.3d 680, 688 (2004); *Johnson* v. *Testman*, 380 F.3d 691, 696 (2004). Notably, the Second Circuit has recognized that *Woodford* "questioned the continued viability" of its "special circumstances" exception. *Amador* v. *Andrews*, 655 F.3d 89, 102 (2011). Indeed, it has never found "special circumstances" since *Woodford*. *E.g.*, *Ruggiero* v. *County of Orange*, 467 F.3d 170, 176 (2006).[4]

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[4] To the extent it is relevant, it is well-settled in the habeas context that a reasonable mistake of law does not excuse a procedural default. The "cause" and "prejudice" standard requires "something *external* to the petitioner"; "some objective factor external to the defense [that] impeded * * * efforts to comply with the State's procedural rule." *Coleman* v. *Thompson*, 501 U.S. 722, 733 (1991) (citation omitted). But here, there was no external, objective impediment to respondent complying with the prison's grievance procedures: Those procedures were available, but respond-

c. The court of appeals' approach also undoes Congress's elimination of the pre-PLRA requirements that the prison's procedures be "plain." CRIPA § 7(a), 94 Stat. 352. A prison's procedures will be subject to a "reasonable mistake" defense only if a federal court concludes that the regulations are "confusing"—that is, not "plain." That simply restores a requirement that Congress deleted.

The "reasonable mistake" exception moreover would undermine several of the PLRA's purposes. First, Congress intended to get the federal courts (and the federal government) out of the business of dictating what procedures state prisons should adopt for resolving inmate disputes. But the court of appeals' approach puts federal courts right back into that business, and creates an incentive for state prisons to rewrite their procedures to "anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." Pet. App. 26 (Agee, J., dissenting). Second, whereas Congress intended the PLRA to "discourage[] 'disregard of [the agency's] procedures,'" *Woodford*, 548 U.S at 89 (quoting *McCarthy*, 503 U.S. at 145), the court of appeals' approach would encourage prisoners to argue that the prison's stated procedures should be disregarded because they could be confusing. Although it is certainly a good practice for a prison to have procedural rules that are clear and easy to understand, under the PLRA that is no longer a federal mandate.

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ent failed to use them because of his own misunderstanding or ignorance.

That is not to say that prisons have *carte blanche* to adopt procedural requirements that are designed to "trip[] up all but the most skillful prisoners." *Woodford*, 548 U.S. at 102. If grievance procedures are so bewildering that no reasonable prisoner could discern them, or are an endless morass reminiscent of *Bleak House*, then an administrative remedy would not be "available" and a prisoner would not need to exhaust. Officials also cannot trip up prisoners by creating arbitrary or wholly inconsequential procedural impediments then dismissing a claim whenever a prisoner fails to comply perfectly with all of them, as *Woodford* requires proper compliance with "critical" procedural rules. *Id.* at 90; see *id.* at 95. And officials who intentionally thwart prisoners from successfully navigating the grievance process also could render those remedies "unavailable," or could be estopped from raising exhaustion as a defense. See *Hemphill*, 380 F.3d at 686 (discussing availability and estoppel in light of intimidation by prison guards).

d. The purposes of requiring a prisoner to exhaust available administrative remedies are not fully satisfied when a prisoner participates in an internal investigation but does not request an administrative remedy.

As the record here vividly confirms, internal investigations can be immensely helpful in "producing a useful administrative record," which is one important purpose underlying the PLRA's exhaustion requirement. *Jones*, 549 U.S. at 204. The administrative record here, for example, culminated in the prison's finding that another officer (Madigan) had engaged in conduct unbecoming of an officer in assaulting respondent while he was handcuffed. J.A. 195.

Nonetheless, the two different processes may lead to somewhat different administrative records, because an internal investigation ordinarily has a different focus and goals than a grievance process. In an excessive-force case like this, for example, both an internal investigation and a request for an administrative remedy would likely focus on guards' actions and whether they complied with relevant prison procedures. But the extent of any injuries the prisoner suffered may have less relevance in an internal investigation than in a grievance process, where the extent of injury may be a central focus. Medical records and other similar evidence of the extent of the prisoner's injuries thus may be lacking or less developed if the prisoner never requests a remedy, thus providing less help to a court when considering a claim for damages under Section 1983. See Pet. App. 23 (Agee, J., dissenting).

Internal investigations are also less likely to "allow[] prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court" and "to reduce the number of inmate suits." *Jones*, 549 U.S. at 204; see *Nussle*, 534 U.S. at 528 ("promot[ing] administrative redress" is a "dominant" purpose of the PLRA). "An internal-affairs investigation may lead to disciplinary proceedings targeting the wayward employee but ordinarily does not offer a remedy to the prisoner who was on the receiving end of the employee's malfeasance." *Pavey* v. *Conley*, 663 F.3d 899, 905 (7th Cir. 2011). For example, under grievance procedures, a prisoner can ordinarily obtain some kind of in-kind remedy, such as the return of missing property, access to hygiene products he was wrongly denied, repairs to broken fixtures in a cell, or the like. Moreo-

ver, although grievance procedures in the federal prison system and some states ordinarily do not permit an award of money damages, see *Booth*, 532 U.S. at 734, 739-741, grievance procedures in other states—including Maryland—allow money damages. See J.A. 320 (defining "relief" to include "compensation"); Md. Code Regs. 12.07.01.10(D) ("monetary damages" available via the Inmate Grievance Office). The purposes of exhaustion are thus not fully satisfied when the prisoner participates in an internal investigation rather than filing a grievance.

Finally, it would be anomalous for the PLRA to compel prisoners to obey a prison's deadlines for filing a grievance—and thus to prohibit a prisoner from suing if he filed his grievance one day late—but to permit prisoners to ignore a prison's requirement that he "present his grievance in the proper forum." *Pavey*, 663 F.3d at 906. Just as rules dictating *when* that decisionmaking process must be initiated are important to prison administration, so are a prison's rules about *who decides* whether a grievance has merit. Because respondent failed to comply with that important procedural requirement about who decides a prisoner's grievance, respondent has failed to properly exhaust and his suit should be dismissed. *Woodford*, 548 U.S. at 84-85.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* LEGAL AID SOCIETY OF NEW YORK AND MORNINGSIDE HEIGHTS LEGAL SERVICES, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Legal Aid Society of the City of New York is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. It is the largest provider of criminal defense services in New York City, and large numbers of its clients are held in City jails. In addition, through its Prisoners' Rights Project (PRP), established in 1971, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy on behalf of prisoners in the New York State prisons and the New York City jails. PRP has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) virtually since the statute's enactment, both as counsel and as amicus curiae.[2]

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g., Amador v. Andrews*, 655 F.3d 89 (2d Cir. 2011) (interpreting PLRA exhaustion requirement in PRP case); *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004) (same); *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (en banc) (interpreting PLRA prospective relief provisions in PRP case), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999); Brief for American Civil Liberties Union, The Legal Aid Society, et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 549 U.S. 199 (2007) (Nos. 05-7058, 05-7142), 2006 WL 2364683 (amici brief in Supreme Court concerning PLRA exhaustion requirement); Brief for American Civil Liberties Union, The Legal Aid Society, et al. as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 284226 (same).

Morningside Heights Legal Services, Inc. (MHLS) is a private, non-profit organization located at Columbia University School of Law. Lawyers and law student interns at MHLS perform legal services in the public interest, provide legal assistance, and assist legal services programs in representation of their clients. MHLS has regularly provided legal representation to prisoners at state and federal prisons and jails for more than twenty-five years. MHLS lawyers accept appointment by federal courts in civil cases challenging conditions of confinement, including actions brought under 42 U.S.C. § 1983, where prisoners are subject to the exhaustion requirements of the PLRA.

SUMMARY OF ARGUMENT

The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), requires exhaustion of available remedies. However, as this Court has held, administrative law principles govern PLRA exhaustion. Administrative law allows exceptions to exhaustion requirements under appropriate, limited circumstances, and lower courts have recognized the applicability of that principle to the PLRA.

The doctrine of administrative exhaustion must be applied with a regard for the particular administrative scheme at issue. Characteristics of the prison environment, coupled with the complexity of many grievance procedures and the distinct disadvantages faced by many prisoners in navigating such systems, mandate that failure to exhaust be excused under certain circumstances, *i.e.* where the prisoner acted objectively reasonably rather than simply failing or refusing to use the administrative procedure. Those circumstances include a case like

this one, where the requirements of exhaustion were not clear but the prisoner gave ample notice to officials of his claim. The purposes of exhaustion are not served by forfeiture of the prisoner's claim under these circumstances.

ARGUMENT

I. ADMINISTRATIVE LAW PRINCIPLES SUPPORT APPROPRIATELY LIMITED EXCEPTIONS TO THE "PROPER EXHAUSTION" REQUIREMENT OF THE PLRA.

The PLRA provides that no prisoner may file suit in federal court "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This Court found in *Woodford v. Ngo*, 548 U.S. 81, 93 (2006), that Congress intended the PLRA's requirement of administrative exhaustion "to mean what the term means in administrative law, where exhaustion means proper exhaustion." Proper exhaustion, however, is not an absolute requirement: administrative law allows for some exceptions where appropriate. *Woodford*, 548 U.S. at 103 (Breyer, J., concurring). This Court has further acknowledged that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (citing *Parsi v. Davidson*, 405 U.S. 34 (1972); *McKart v. U.S.*, 395 U.S. 185 (1969)). As lower courts have recognized, within the PLRA context, it is consistent with administrative law to allow limited exceptions in cases where the prisoner's actions were reasonable under the circumstances. In such cases, dismissal for non-exhaustion would not serve the statutory purpose of

allowing prison officials a chance to resolve problems before litigation while preserving meritorious claims.[3] Barring such claims would be fundamentally unfair.

While the PLRA mandates only that prisoners exhaust "remedies [that] are available," § 1997e(a), and courts have denied dismissal for non-exhaustion on the ground that the remedy was not available under specified factual circumstances,[4] some

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[3] The legislative history is replete with statements that the PLRA would not impede but would, in fact, promote legitimate and meritorious claims by prisoners. 141 Cong. Rec. 1480 (1995) (statement of Rep. Charles Canady) ("These reasonable requirements will not impede meritorious claims by inmates."); 141 Cong. Rec. 7526 (1995) (statement of Sen. Jon Kyl) ("[W]e will free up judicial resources for claims with merit by both prisoners and nonprisoners."); 141 Cong. Rec. 14626–27 (1995) (statement of Sen. Orrin Hatch) (introducing an amendment "virtually identical" to the PLRA) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); 141 Cong. Rec. 14628 (1995) (statement of Sen. Harry Reid discussing amendment identical to entire PLRA) ("If [prison inmates] have a meritorious lawsuit, of course they should be able to file."); 141 Cong. Rec. 14628 (1995) (statement of Sen. Strom Thurmond) (discussing amendment identical to entire PLRA) ("This amendment will allow meritorious claims to be filed.").

[4] Courts have found remedies unavailable for a variety of reasons. *See, e.g.*, *DeBrew v. Atwood*, 792 F.3d 118, 132 (D.C. Cir. 2015) (holding remedy was not available where officials required prisoner to attach to his grievance a document that other officials failed to provide to him); *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) ("An administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it."); *Hurst v. Hantke*, 634 F.3d 409, 411–12 (7th Cir. 2011) (holding remedy would be unavailable if prisoner was

scenarios do not fit comfortably within the rubric of availability and unavailability, at least as those words are ordinarily understood.[5]

Within administrative law, courts have identified various strains of exhaustion. Exhaustion requirements may be imposed by federal common law or statute. II Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.3, at 1241 (Wolters Kluwer 2010). Where exhaustion is required by statute, this Court has distinguished between exhaustion requirements that are "simply a codification of the judicially developed doctrine of

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incapacitated by stroke during time when he was required to file grievance, and he was not allowed to file a late grievance), *cert. denied*, 132 S. Ct. 168 (2011); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ("Prison officials may not take unfair advantage of the exhaustion requirement and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting."); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (noting defendants' concession that denial of grievance forms, in a system that required using the form, made the remedy unavailable to the plaintiff).

[5] Some courts have held prison officials estopped to claim non-exhaustion where their actions or omissions prevented or contributed to preventing a prisoner from properly exhausting. However, estoppel is usually thought of as a personal defense, which would not be applicable to instances where the persons who interfered with exhaustion are not the named defendants in the case. *See, e.g.*, *Dillon v. Rogers*, 596 F.3d 260, 270 (5th Cir. 2010) (reasoning that statements by prison captain and inmate counsel could not estop appellees because the former were not defendants in this case, and appellees were being sued in their individual capacities); *Silvagnoli v. Figueroa*, No. 12 Civ. 7761 (AT), 2014 WL 4160213, at *5 (S.D.N.Y. Aug. 19, 2014) ("The actions of a non-defendant do not estop the defendants from asserting the non-exhaustion defense.").

exhaustion" and exhaustion requirements that are "jurisdictional," which deprive federal courts of jurisdiction to hear cases stemming from administrative action in the absence of exhaustion. *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). Accordingly, when a statute requires exhaustion, it may create either an exhaustion requirement that is "jurisdictional, and thus non-waivable, or non-jurisdictional," and thus waivable. *Hettinga v. U.S.*, 560 F.3d 498, 503 (D.C. Cir. 2009).

This Court affirmed in *Woodford* what the lower courts had already agreed upon: that the PLRA exhaustion requirement is not jurisdictional. *Woodford*, 548 U.S. at 101, *see also Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677–78 (4th Cir. 2005) ("Every court to have considered the question has concluded that [PLRA] § 1997(e)(a)'s exhaustion requirement is not a jurisdictional requirement.") (collecting cases). Thus the PLRA exhaustion requirement does not deprive the federal courts of jurisdiction to hear un-exhausted claims. Rather, the non-jurisdictional exhaustion requirement of the PLRA allows courts to excuse failure to exhaust where circumstances so warrant.

As has been acknowledged in this Court, administrative law "contains well established exceptions to exhaustion." *Woodford*, 548 U.S. at 103 (Breyer, J., concurring).[6] *Amici* do not argue that

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[6] *Woodford* has generated confusion among the lower courts as to what, if any, exceptions may apply to the PLRA's exhaustion requirement. As noted by Judge Kozinski on *Woodford*'s remand, "[i]t is unclear whether we can read exceptions into the PLRA's exhaustion requirement." *Ngo v. Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008); *see also Parker v. Robinson*, Civil No. 04-214-B-W, 2006 WL 2904780, at *9–10 (D. Maine Oct. 10, 2006) ("the [*Ngo*] majority never mention[ed] [the]

any *a priori* list of exceptions, well-established or otherwise, should be imported wholesale into the PLRA context. Indeed, the Court noted in *Woodford* that one of the well-established exceptions—that for constitutional claims—was grossly inappropriate for the PLRA: "we fail to see how such a carve-out would serve Congress' purpose of addressing a flood of prisoner litigation in the federal courts, when the overwhelming majority of prisoner civil rights and prison condition suits are based on the Constitution." *Woodford*, 548 U.S. at 91 n.2 (internal citations omitted).

However, prisoners' failure to exhaust should be excused where it is objectively reasonable. The PLRA exhaustion requirement's purpose would not be served by extinguishing prisoners' claims under such circumstances.

As the Second Circuit stated in the case that the court below relied upon, justification for failure to exhaust in the prescribed fashion "must be determined by looking at the circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way." *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004). That is, the Court must consider the

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concurrence by Justice Breyer [i]n a post-*Ngo* universe it may still be possible for an incarcerated plaintiff to overcome an admitted procedural misstep in the grievance process and survive the assertion of a 42 U.S.C. §1997e(a) defense."). Courts have also noted that a severe interpretation of the PLRA's exhaustion requirement might well create constitutional concerns. *See Ngo v. Woodford*, 539 F.3d 1108, 1112 (9th Cir. 2008) (Pregerson, J., concurring) ("The constitutional rights of prisoners should not be taken away based on a confusing administrative process with such a short timeline.").

characteristics of the prison environment and prison administrative process, along with the purposes of the PLRA exhaustion requirement, in determining when, if ever, prisoners may be allowed to proceed without proper completion of the administrative process.

In *Giano v. Goord*, the plaintiff pursued his claim in an administrative appeal of the disciplinary conviction; the defendants argued he should have filed a grievance instead. *Id.* The court noted that there are some cases in which remedies may be available, but non-exhaustion is justified by "special circumstances"—in Mr. Giano's case, the fact that his misreading of the relevant regulations was "hardly unreasonable" because they did not differentiate clearly between grievable and non-grievable matters concerning disciplinary proceedings. *Id.* at 677–79. Indeed, a "learned federal district court judge" had only recently interpreted the same regulations similarly to Mr. Giano. *Id.* at 679.[7] Other jurisdictions display a

[7] The lack of clarity in these rules is further demonstrated by the fact that, some years later, New York prison officials made precisely the opposite argument as in *Giano* on similar facts, asserting that a prisoner who *had* filed a grievance claiming retaliatory false discipline should instead have filed a disciplinary appeal. *Larkins v. Selsky*, No. 04 Civ. 5900 (RMB)(DF), 2006 WL 3548959, at *9 (S.D.N.Y. Dec. 6, 2006) (stating that *Giano* "nearly mirrors this [case] on all fours"). More recently, the *Giano* scenario was reprised in *Williams v. Doe*, No. 12-CV-1147S (SR), 2015 WL 1567498, at *3 (W.D.N.Y. Apr. 8, 2015), showing that prison authorities had done nothing in the eleven years since *Giano* to clarify their ambiguous rule.

similar lack of clarity in rules governing disciplinary and grievance proceedings.[8]

The *Giano* decision represents a judgment, equally applicable here, that the dismissal of a prisoner's claim because he guessed wrong about unclear regulations does not serve the purpose of the PLRA exhaustion requirement to ensure that prisoners give prison authorities a chance to address their problems before suit is filed. Mr. Giano did his best as he reasonably understood matters, and for that reason it was consistent with the PLRA's purposes to allow him to go forward rather than forfeit his claim.[9]

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[8] *See, e.g.*, *Riggs v. Valdez*, No. 09-CV-010-BLW, 2010 WL 4117085, at *10 (D. Idaho Oct. 18, 2010) (noting lack of clarity in rule barring grievances about disciplinary "'hearing process including findings and sanctions,'" and prison officials' rebuffing of those prisoners who tried to grieve), *on reconsideration in part*, 2010 WL 5391313 (D. Idaho Dec. 22, 2010); *Ortego v. Forcht Wade Corr. Center*, No. 09-cv-0199, 2010 WL 2985830, at *3 (W.D. La. Apr. 29, 2010) (noting conflict over whether retaliatory discipline should be pursued via grievance or disciplinary appeal), *report and recommendation adopted in part, rejected in part*, 2010 WL 2990067 (W.D. La. July 27, 2010); *Cahill v. Arpaio*, No. CV 05-0741-PHX-MHM (JCG), 2006 WL 3201018, at *2 (D. Ariz. Nov. 2, 2006) (stating jail rules concerning what aspects of a disciplinary incident can be grieved are "sufficiently confusing such that Plaintiff's interpretation that he could not grieve his excessive force claim is reasonable"); *Shaw v. Jahnke*, 607 F. Supp. 2d 1005, 1011 (W.D. Wis. 2009) (noting confusion of grievance personnel and state lawyers about the relation of exhaustion to disciplinary appeals, suggesting state clarify its rules).

[9] Dismissal for non-exhaustion generally will be the death knell of the prisoner's claim because of the very short time limits that are prevalent in prison grievance systems. *See Woodford v. Ngo*, 548 U.S. 81, 118 (2006) (Stevens, J., dissenting) (noting "strict time requirements [in grievance systems] that are

This judgment is consistent with this Court's holding that non-exhaustion should be excused in a case where the agency was operating under an undisclosed policy so that affected persons literally did not know what they should be appealing. *See Bowen v. City of New York*, 476 U.S. 467 (1986). That decision did not refer to "special circumstances," but did cite the "unique circumstances" under which exhaustion would have served no useful purpose. *Id.* at 485. *Bowen* illustrates the need for a degree of case-by-case play in the joints in exhaustion schemes to respond to unusual situations where strict enforcement of exhaustion rules neither serves the purposes of exhaustion nor respects justice to the individuals involved. *Amici* urge the same result in this case.

II. PRISON GRIEVANCE SYSTEMS PRESENT DIFFICULTIES IN EXHAUSTION DIFFERENT FROM THOSE IN OTHER ADMINISTRATIVE AGENCIES.

There are characteristics of the prison environment and of prison administrative systems that differ sharply from those of the administrative agencies that this Court has more often dealt with, such as the Environmental Protection Agency, National Labor Relations Board, and others. These differences are sometimes not conducive to the fair processing (or in some cases, any processing) of prisoner complaints. Thus they support the recognition of a narrow exception to the exhaustion

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generally no more than 15 days, and that, in nine States, are between 2 and 5 days" (footnote omitted)).

requirement, consistent with the Fourth Circuit's holding.

Under most statutory schemes and agency regulations, parties bring their complaints before an independent Administrative Law Judge (ALJ) who adjudicates disputes either between two separate parties (*e.g.*, the Federal Mediation and Conciliation Service, *see* 29 U.S.C. §§ 171–72 (creating an independent agency with the power to intervene and settle labor disputes between parties)), or between a claimant and an agency (*e.g.*, the Social Security Administration, *see Heckler v. Day*, 467 U.S. 104 (1984) (describing the Social Security Administration's adjudicative and investigative process for disability claims)). In most of these proceedings, parties and claimants are entitled to the central features of a trial proceeding, including representation by counsel, cross-examination of witnesses, presentation of evidence, and sometimes even limited discovery. *See* Administrative Procedure Act, 5 U.S.C. §§ 554, 556, 557 (providing uniform rules for adjudication proceedings in most federal agencies and guaranteeing the right to counsel, present evidence, cross-examine, etc., in most formal adjudication proceedings).

Most of these features are missing in prison. In prison administrative proceedings, the adverse party *and* the judge are prison officials; there is no independent ALJ equivalent. *See Cleavinger v. Saxner*, 474 U.S. 193, 203–04 (1985). Even appeals from first-level decisions are generally brought before higher-ranking officials of the prison system that the prisoner is alleging wronged him or her.[10]

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[10] *See* Michigan Law Prison Information Project, *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey* 18

The Court has recognized the problems this lack of independence can cause in the context of prison disciplinary proceedings:

> Surely, the members of the [disciplinary] committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials albeit no longer of the rank and file, temporarily diverted from their usual duties. They are employees of the [prison] and they are the direct subordinates of the warden who reviews their decisions. They work with the fellow employees who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one

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(2015), *available at* http://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf ("The appeal stage typically involves review by a higher level of administration

When appeals are decided by someone inside the relevant Department of Corrections, that obviously risks bias."). For example, this lack of independent review is present in the state of Maryland's grievance process. The warden, who is ultimately responsible for all misconduct committed by correctional officials under his or her supervision, is also the first person to review a prisoner's grievance—not an ALJ or equivalently independent official. Pet. Br. at 6–7. If the warden denies relief, the prisoner can appeal the decision to the State Commissioner of Correction, who oversees Maryland's entire prison system, and who is also not independent from the prison. *Id.* at 7.

> between a co-worker and an inmate. They thus are under obvious pressure to resolve the disciplinary dispute in favor of the institution and their fellow employee. It is the old situational problem between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicative performance.

Cleavinger, 474 U.S. at 203–04 (internal citations omitted). This risk of abuse by prison staff is likely to be even greater in the case of grievance systems that must be exhausted before filing civil litigation, since that litigation—usually actions under 42 U.S.C. § 1983 or *Bivens* actions—typically seeks findings of liability and awards of damages against prison employees and officials in their personal capacities. Even where the litigation is purely injunctive in nature, it seeks orders forcing those employees and officials to change their rules, procedures, or practices.

Thus, unlike typical federal agency systems, the incentives surrounding prison grievance systems do not weigh in favor of fair and efficient decision-making on the merits of grievances. Instead, they weigh in favor of procedural dismissals, which, twenty years after the PLRA was enacted, everyone in prison is likely to know will insulate the prison and its personnel from liability and judicial interference. They weigh in favor of unclear rules, over-complicated procedures, and inconsistent administration that favors the prison and its personnel. Even if prison officials do not consciously "create procedural requirements for the purpose of tripping up all but the most skillful prisoners," *Woodford v. Ngo*, 548 U.S. 81, 102–03 (2006), they

have little reason to correct procedural requirements that have that effect. *See, e.g., supra* note 7 (discussing how New York prison officials did not clarify an ambiguous rule eleven years after the Second Circuit found it ambiguous).

Furthermore, unlike typical federal agency systems, which contain centralized and routine adjudicative safeguards and rights, there are dozens of independent prison systems on the city and state levels, each with its own internal procedures and rules for exhausting claims.[11] Such fragmentation heightens the risk of defective procedures, proliferating and increasing the need for a safety valve exception to prisons' exhaustion requirement, as the court below recognized.

Lastly, experience with prison grievance systems generally shows that they are considerably less orderly and reliable than most non-prison administrative systems. The clearest indication of this point is the very large number of cases in which it appears that a prisoner received no response *at all* to a grievance or a grievance appeal.[12]

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[11] *See* Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 (providing a table in the appendix illustrating the different rules and procedures for filing grievances and appeals in the various city and state correctional agencies).

[12] The collection in this note identifies only cases where multiple grievances were ignored. *See, e.g., Small v. Camden Cnty.*, 728 F.3d 265, 273 (3d Cir. 2013) (observing that "[t]here is no dispute" that prisoner received no response to multiple grievances); *Davis v. Corr. Corp. of Am.*, 463 F App'x. 748, 749–50 (10th Cir. 2012) (noting concession that prison staff did not respond to five informal complaints about prisoner's housing

III. THERE ARE CIRCUMSTANCES THAT MAY THWART EXHAUSTION OF PRISON GRIEVANCE SYSTEMS BY PRISONERS.

Nearly two decades after enactment of the PLRA, there is an extensive body of federal case law—reflecting a large amount of experience with prison administrative systems—that demonstrates that prisoners are unable to raise meritorious claims in federal court despite their efforts to exhaust. Those cases demonstrate the need for a narrowly tailored

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assignment, as prison rules required); *Mann v. Scott*, Civ. No. 14-3474-RMG, 2015 WL 5165198, at *4–5 (D.S.C. Sept. 1, 2015) (finding non-responses to more than six "requests to staff," which are prerequisites to filing grievances); *Salcedo-Vazquez v. Nwaobasi*, No. 3:13-CV-00606-NJR-DGW, 2014 WL 2580517, at *5 (S.D. Ill. June 9, 2014) (finding it "clear that Plaintiff complained about his medical condition throughout the relevant time period" based on his prison counselor's notes and stating the "Court is not convinced that he ever received a response such that he could then take the next step of submitting the matter to a grievance officer."); *Castellanos v. Pfister*, No. 12-1452, 2014 WL 377742, at *3 (C.D. Ill. Feb. 3, 2014) (observing that defendants "have presented no arguments or evidence in opposition to Plaintiff's position regarding [two] August emergency grievances that named Defendant Durbin and that went unanswered."); *Raybon v. Totten*, No. 2:12-cv-1008 EFB P, 2013 WL 3456968, at *3–4 (E.D. Cal. July 9, 2013) (declining to dismiss for non-exhaustion where it was undisputed there was no response to plaintiff's second and third level grievance appeals), *report and recommendation adopted*, 2013 WL 4407268 (E.D. Cal. Aug. 14, 2013); *Garcia v. Heath*, No. 12 CV 4695 (CM), 2013 WL 3237445, at *1–2 (S.D.N.Y. June 25, 2013) (dismissing for non-exhaustion although the prisoner's two grievances and five follow-up letters had all gone unanswered); *Nassar v. Warden, Butler Cnty. Jail*, No. 1:10-cv-031, 2011 WL 7268004, at *5 (S.D. Ohio Sept. 1, 2011) (finding that prisoner properly pursued grievance at two stages but did not receive responses consistently with policy at either stage).

exception to exhaustion. *Amici* set forth below a sampling of circumstances where non-exhaustion of arguably available remedies may be justified and non-exhaustion may appropriately be excused.

A. Hyper-Technical Errors

There are numerous district court decisions that declare a prisoner failed to properly exhaust because of minor, hyper-technical deviations from the complicated and stringent procedures required by prison systems to grieve properly.

For instance, in *Fischer v. Smith*, a prisoner's claim alleging inadequate medical care in violation of the Eighth Amendment was dismissed because the prisoner submitted a carbon copy of his grievance form instead of the original form. No. 10-C-870, 2011 WL 3876944, at *2 (E.D. Wis. Aug. 31, 2011). Although the prisoner promptly submitted the original form after his initial carbon copy grievance was denied, it was then deemed untimely, permanently preventing the prisoner from grieving through either the prison administrative system or the federal courts. *Id.*

In another case, a prisoner pursued multiple grievances and appeals complaining of inadequate medical care, which were procedurally denied. *Elliott v. Jones*, No. 4:06-cv-00089-MP-AK, 2008 WL 420051 (N.D. Fla. Feb. 12, 2008). They were denied because the prisoner "wrote outside the boundaries of the form" and filed the medical grievances as emergency grievances, rather than non-emergency grievances. *Id.* at *5. In denying the defendant's motion to dismiss for failure to properly exhaust administrative remedies, the district judge stated that "[p]laintiff gave fair notice of his claims and provided sufficient detail to the corrections staff to

facilitate some relief for his circumstances, if such was warranted. He was not attempting to flout the system or improperly bypass procedural rules This[], in the opinion of the undersigned, constitutes an attempt to complete, i.e. exhaust his administrative remedies." *Id.* Had it not been for this judge's understanding of the core principles behind the doctrine of exhaustion, this potentially meritorious complaint would likely have been dismissed on minor technicalities.[13]

B. Interference by Prison Officials

Courts have been presented with a range of institutional conduct that has interfered with a prisoner's ability to exhaust available remedies. That conduct has run the gamut from failing to provide necessary forms and providing erroneous information about available remedies and procedures to overt threats and hostility.

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[13] Other scenarios which could result or have resulted in meritorious complaints being dismissed on hyper-technicalities include: submitting a statement under penalty of perjury, rather than by notarized affidavit, *Thomas v. Parker*, No. CIV-07-599-W, 2008 WL 2894842, at *12 (W.D. Okla. July 25, 2008) (dismissing claim), *aff'd*, 318 F. App'x. 626 (10th Cir. 2009), *cert. denied*, 558 U.S. 899 (2009); filing a new grievance rather than seeking reinstatement of an already filed grievance, *Whitney v. Simonson*, No. CIV-S-06-1488 FCD GGH P, 2007 WL 3274373, at *2 (E.D. Cal. Nov. 5, 2007) (dismissing for non-exhaustion; admitting defendants' approach is "hypertechnical" but holding *Woodford* requires dismissal nonetheless), *report and recommendation adopted*, 2007 WL 4591593 (E.D. Cal. Dec. 28, 2007), *aff'd*, 317 F. App'x. 690 (9th Cir. 2009); and writing in pink ink instead of blue or black ink, *Ramsey v. McGee*, No. Civ 06-313-RAW-SPS, 2007 WL 2744272, at *2 (E.D. Okla. Sept. 19, 2007) (noting grievance returned unprocessed).

For example, erroneous direction by prison staff was found to justify non-exhaustion in *Brownell v. Krom*, 446 F.3d 305 (2d Cir. 2006). In that case, a prisoner claimed that corrections officers hindered his right of access to the courts by losing eleven of his fourteen bags of property. *Id.* at 307–08. Misinformed by prison staff, the prisoner decided to abandon his lost property claim and file a grievance instead, and was later time-barred from appealing his lost property claim. *Id.* at 308–09. Recognizing the role that prison staff played in misguiding the prisoner, the Second Circuit found that special circumstances excused the prisoner's failure to exhaust. *Id.* at 312. And relevant grievance forms were not provided in *Jones v. Fed. Bureau of Prisons*, No. 11-CV-4733 (KAM)(MDG), 2013 WL 5300721, at *8 (E.D.N.Y. Sept. 19, 2013). There, in addition to refusing to supply grievance forms, prison officials also placed a prisoner in solitary confinement for demanding those forms. *Id.* Fortunately for Jones, the district court and magistrate judges found that special circumstances may justify his failure to exhaust, and accordingly denied defendants' motion for summary judgment for non-exhaustion. *Id.*

Prison grievance systems are poorly insulated from what this Court has acknowledged as "the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985). In many instances the filing of grievances, or the anticipation of them, has led to threats, and the

actuality, of violent confrontation and retaliation by prison staff against the complaining prisoners.[14]

Explicit and egregious staff misconduct excused non-exhaustion in *Gibson v. Rosati*, No. 9:13-cv-503 (GLS/TWD), 2014 WL 3809162 (N.D.N.Y. Aug. 1, 2014). There, a prisoner—in retaliation for prior civil rights litigation—was placed in a choke hold, told that officers would kill him, forced to the ground, repeatedly kicked, handcuffed and chained, and punched, "'for taking [defendants] to court.'" *Id.* at *2. Recognizing that "an individual of ordinary firmness" might have acted in the same way as the prisoner under the circumstances, the district court

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[14] *See, e.g., Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 577 (6th Cir. 2014) (noting allegation on summary judgment that a captain told plaintiff that if he continued with his grievances about an attack she would have him "transferred to a penitentiary and [he would] more than likely be attacked and not just beat up," and said that she transferred him to the Security Housing Unit "because of the fuckin' Tort Claim [he] filed!"), *cert granted on other grounds sub nom. Simmons v. Himmelreich*, 136 S. Ct. 445 (2015); *King v. Zamiara*, 680 F.3d 686 (6th Cir. 2012) (directing entry of judgment against officials who increased prisoner's security classification based on his pursuit and instigation of complaints and grievances), *cert. denied*, 133 S. Ct. 985 (2013); *Haynes v. Stephenson*, 588 F.3d 1152 (8th Cir. 2009) (awarding nominal and punitive damages for disciplinary charges filed in retaliation for statements in a grievance); *Kaba v. Stepp*, 458 F.3d 678, 682 (7th Cir. 2006) (citing "specific and detailed" allegations of threats and assault for pursuing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied sub nom. Beauclair v. Gomez*, 534 U.S. 1066 (2001); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program).

and magistrate judges denied defendants' motion to dismiss for failure to exhaust. *Id.* at *9.

C. Complex and Ambiguous Procedures

The rules and procedures of prison administrative systems are often ambiguous and difficult for laypersons without counsel to navigate correctly.[15] As the Court has acknowledged in a related context, "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman*, 404 U.S. 522, 527 (1972) (addressing Title VII's requirement of filing a charge with the Equal Employment Opportunity Commission before filing suit). That observation is true *a fortiori* for the prison population, which is characterized by low levels of literacy,[16] high levels of

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[15] A number of federal courts have so observed. *See, e.g., Brooks v. Roy*, 776 F.3d 957, 961 (8th Cir. 2015) (stating "we recognize the confusion caused to Brooks, and likely to other inmates, by MDOC's complex, multiple-layered grievance system "); *Frasier v. McNeil*, No. 13 Civ. 8548(PAE)(JCF), 2015 WL 1000047, at *8 (S.D.N.Y. Mar. 5, 2015) (court "unable to discern the exhaustion requirements"); *Hairston v. LaMarche*, No. 05 Civ. 6642(KMW)(AJP), 2006 WL 2309592, at *9–10 (S.D.N.Y. Aug. 10, 2006) (noting the lack of clarity in New York State administrative appeal procedures in cases where a Superintendent has referred a complaint to the Inspector General for investigation).

[16] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dep't. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17–19 (1994), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102.

mental illness[17] and cognitive disability,[18] and limited proficiency in English.[19]

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[17] *See, e.g.*, Doris J. James & Lauren E. Glazem, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/mhppji.pdf ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem More than two-fifths of State prisoners (43%) and more than half of jail inmates (54%) reported symptoms that met the criteria for mania. About 23% of State prisoners and 30% of jail inmates reported symptoms of major depression. An estimated 15% of State prisoners and 24% of jail inmates reported symptoms that met the criteria for a psychotic disorder."); Council of State Governments, *Criminal Justice/Mental Health Consensus Project* xii (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf ("Each year, ten million people are booked into U.S. jails; studies indicate that rates of serious mental illness among these individuals are at least three to four times higher than the rates of serious mental illness in the general population.").

[18] Data compiled by the Department of Justice's Bureau of Justice Statistics shows that 20% of prison inmates and 31% of jail inmates report having a cognitive disability, as compared with only 5% of the general population reporting the same. Jennifer Bronson et al., U.S. Dep't. of Justice, *Disabilities Among Prison and Jail Inmates, 2011–12*, 3 (2015).

[19] *See* Haigler et al., *supra* note 16, at xx ("Inmates who come from homes where only a non-English language was spoken demonstrate significantly lower proficiencies than those who come from homes where English was spoken. The proficiencies of these inmates from a non-English language background indicate that they demonstrate skills associated with only the most basic literacy tasks."). *Cf.* Human Rights Watch, *Barred from Treatment: Punishment of Drug Users in New York State Prisons* 30–31 (2009), *available at* https://www.hrw.org/report/2009/03/24/barred-treatment/punishment-drug-users-new-york-state-prisons (noting language barriers as obstacle to medical treatment).

There are numerous cases in which prisoners are found to have failed to properly exhaust their claims because of procedural complexities created by prison systems.

For instance, in *Ferguson v. Bizzario*, No. 09 Civ. 8106 (PKC), 2010 WL 4227298 (S.D.N.Y. Oct. 19, 2010), the court denied the defendants' motion to dismiss for non-exhaustion. There, a prisoner alleged that he was confined with more than ten general population inmates during a facility fire drill, was assaulted by these inmates, and was subsequently exposed to chemical agents excessively discharged by prison staff, causing swelling in his right hand and loss of sensation in his finger and palm. *Id.* at *1. The court found that special circumstances existed to justify non-exhaustion because the Inmate Handbook did not detail the five day filing period within which prisoners must grieve. *Id.* at *5–7 Without an objective reasonableness exception, this potentially meritorious complaint would have been dismissed even though the prisoner could not have discovered the time bar.[20]

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[20] Other examples of cases involving procedural complexities created by prison systems are: *Thomas v. Hernandez*, No. 09cv1336-LAB (PCL), 2012 WL 4496826, at *3 (E.D. Cal. Sept. 28, 2012) (prison rule stating that appeal must be "forwarded to the appeals coordinator" did not, as defendants contended, clearly exclude giving it to other staff for forwarding); *Rahim v. Holden*, 882 F. Supp. 2d 638, 642–43 (D. Del. 2012) (instructions stating that parole decisions are "non-grievable" did not, as defendants argued, clearly distinguish between procedural complaints against State defendants in the parole process and substantive complaints against the Board of Parole in making its parole decision); *Smith v. Maypes-Rhynders*, No. 07 Civ. 11241 (PAC)(MHD), 2011 WL 4448944, at *11 (S.D.N.Y. July 28, 2011) (prisoner's grievance appeal was returned without instructions as to correcting defects or other steps to be

As explained above, the "special circumstances" exception at issue herein originated in *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), a case involving a distinction between the scope of grievances and of disciplinary appeals so murky that judges as well as the plaintiff had difficulty understanding it. *See supra* p. 7–9 (discussing *Giano*).

In other cases, prisoners have not been as fortunate as Mr. Giano, losing their claims because they guessed wrong in interpreting grievance rules. For example, in *Marshall v. Knight*, No. 3:03-CV-460 RM, 2006 WL 3714713, at *1 (N.D. Ind. Dec. 14, 2006), an Indiana prisoner alleged that he had been retaliated against in classification and disciplinary matters, but did not file a grievance because classification and disciplinary matters were excluded from the grievance system. The court held that he had failed to exhaust because retaliation claims might be grievable, even if their subject matter was not. *Id.*

Unlike *Giano*, the *Marshall* decision gave no consideration to the reasonableness of Mr. Marshall's interpretation of the rules. *See also Williams v. McGrath*, No. C 04-5069 MMC (PR), 2007 WL 3010577, at *6 (N.D. Cal. Oct. 12, 2007) (holding a

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taken), *report and recommendation adopted*, 2011 WL 4444214 (S.D.N.Y. Sept. 26, 2011); *Lemons v. Dragmister*, Civ. Action No. 3:08-CV-423 JVB, 2010 WL 530073, at *2 (N.D. Ind. Feb. 9, 2010) (refusing to enforce rule requiring signing of grievances where grievance form did not have a signature line because to do so "would effectively sand-bag unsuspecting inmates"); *Warren v. Purcell*, No. 03 Civ. 8736 (GEL), 2004 WL 1970642, at *6 (S.D.N.Y. Sept. 3, 2004) (prisoner received "return of grievance" form saying that prisoner's grievance "is being returned" to him, that the grievance "needs to be investigated," and that "[i]t will take a minute before a response").

prisoner whose grievance was rejected for failure to provide necessary documentation, and who was then denied access to the documentation, should have resubmitted his appeal without the documentation, or should have filed a new grievance, despite prisoner's concerns that his grievance had already been rejected once for lack of the documentation and that if he filed a second grievance he would be in violation of the rule against duplicative grievances), *aff'd*, 320 F App'x. 728 (9th Cir. 2009).

D. Mental and Physical Incapacity

Unsurprisingly, courts have found debilitating physical conditions or mental incapacity to present unique circumstances. For example, transfer to a mental hospital after filing a grievance precluded filing a timely appeal in *Petty v. Goord*, No. 00 CIV 803 JSR, 2007 WL 724648, at *8 (S.D.N.Y. Mar. 5, 2007) (finding special circumstances). Multiple medical issues that were complicated by other factors also justified non-exhaustion in *Perry v. Rupert*, No. 9:10-CV-1033 (LEK/TWD), 2013 WL 6816795 (N.D.N.Y. Dec. 20, 2013). In that case, a prisoner wished to file a grievance for denial of medical care but claimed that he was unable to do so because of multiple medical issues including: "onset of symptoms repeated refusal of care, refusal of access to a Sergeant, wrongful transfer to the psychiatric ward, transfer by ambulance to Claxton Hepburn Medical Center for emergency consultation, transfer to multiple other hospitals for eight surgeries, hospitalization for a total of six months, release to a medical RNU, and finally a surgery to have the infected mesh removed fifteen months later." *Id.* at 5. Had the judge not recognized the prisoner's struggles and found that special

circumstances might exist to justify non-exhaustion, this seemingly meritorious claim would have been dismissed for failure to exhaust. *Id.*

CONCLUSION

The Court should acknowledge that under the administrative law principles that *Woodford* held govern PLRA exhaustion, appropriate, limited exceptions that are consistent with the statutory purpose should be allowed. An exception is appropriate in this case where the relevant grievance rules were unclear,[21] the prisoner's actions were objectively reasonable and the prisoner made his complaint well known to prison authorities. The court below properly applied this "special circumstances" exception to allow the Respondent's meritorious claim to go forward.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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[21] *Amici* note that Respondent's initial claim of unclarity has now been amplified by a showing that the prison system's practice at the time was consistent with the Respondent's understanding, and that even now Petitioner cannot say with certainty what the correct course of action for Respondent was. Resp. Br. at 34.

No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AND HUMAN RIGHTS DEFENSE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

The National Police Accountability Project and Human Rights Defense Center are nonprofit organizations that have no parent company and do not issue stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit public interest organizations dedicated to protecting the rights of individuals held in all types of detention facilities in the United States.

The **National Police Accountability Project** ("NPAP") is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct and prison condition cases, and NPAP often presents the views of victims of civil rights violations through *amicus* filings in cases raising issues that transcend the interests of the parties before the Court. NPAP has more than five hundred attorney members throughout the United States.

The **Human Rights Defense Center** ("HRDC") is a nonprofit charitable corporation that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing Prison Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, publishing and distributing self-help reference books

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[1] Counsel for the *amici* provided counsel of record for petitioner and respondent written notice of the intent to file this brief under Supreme Court Rule 37.2(a). Both consented, and record of those consents has been lodged with the Court. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

for prisoners, and engaging in litigation in state and federal courts on issues concerning detainees.

SUMMARY OF ARGUMENT

Petitioner advances a novel interpretation of the Prison Litigation Reform Act's ("PLRA") requirement that inmates exhaust only those administrative remedies that are "available." "[A] prisoner's misunderstanding of the prison's grievance process – reasonable or otherwise – cannot render the process unavailable." Pet. 34. Besides being inconsistent with the law in every circuit to have considered the issue (Resp. 36-40), petitioner's rule would bar judicial review of important claims, would not serve the purpose of the PLRA, and would land hardest on the nation's most vulnerable prisoners. The Court should affirm the ruling below, and definitively establish that prisoners who make objectively reasonable mistakes in the grievance process are not precluded from having their cases heard on the merits.

ARGUMENT

I. Prisoners With Serious Claims Make Objectively Reasonable Errors

The petitioner's proposed rule is bad policy, because it would deny judicial review to inmates with serious claims of harm who trip over institutional grievance rules, no matter how objectively reasonable their error.

There are many stones on which to stumble—"single issue" rules, which require inmates to address only one grievance per complaint; numerical limits on grievances, which can be at cross purposes with the "single issue" rule; time limits as short as a

few days; exacting rules about completing forms; multiple layers of required internal appeals—and they thwart many prisoners.

For example, in *McMiller v. Jones*, 590 Fed. App'x 749 (10th Cir. 2014) cert. denied sub nom. *McMiller v. Patton*, 135 S. Ct. 1559 (2015), an African-American inmate was attacked with a razor blade by his cellmate, who had previously stabbed one African-American and told prison officials "that he would not live with an African American inmate" and "that there would be trouble" if he was put in a cell with one. The injured inmate submitted a grievance form the next day, and when he did not receive a response within two weeks, submitted a "no response" grievance. 10 days later, the prison rejected the "no response" grievance for failure to attach the initial grievance. Within a week, the inmate submitted a grievance attempting to address these shortcomings—but it too was rejected, because it was deemed a new grievance (and so untimely), rather than a corrected grievance (which would have been timely). 590 Fed. App'x at 750, 751-52, 754.

In *Ajala v. Tom*, 592 Fed. App'x 526 (7th Cir. 2015), an inmate suffered permanent nerve damage from handcuffs that were overtightened and left on him for four hours. First, he attempted to file two grievances, but they were rejected as addressing multiple issues. The next week, he attempted to file three grievances—the first two addressing the rejection of the prior week's complaints, the third regarding the handcuffs. The last was rejected for exceeding the prison's limit of two grievances per week. The prisoner resubmitted it in the new week, but it was rejected as

untimely, because the prison required all grievances to be filed within 14 days of the incident. 592 Fed. App'x at 526-27

In *Porter v. Sturm*, 781 F.3d 448 (8th Cir. 2015), an inmate was falsely accused of threatening to send anthrax to the governor. An investigation absolved him, but after he filed an unrelated section 1983 action the prison manager repeated the accusation. This led to a disciplinary hearing where the inmate was found guilty on the manager's word alone, and without consideration of the prior investigation; he was placed in segregation. Although a second hearing cleared him again, he was kept in segregation. The inmate filed a grievance complaining that he was being targeted in retaliation for his 1983 claim, which the warden should have (under prison regulations) responded to within 40 days. When 80 days had passed without a response, the inmate requested an appeal form. The state department of corrections sent him one, along with a letter questioning the need for an appeal and counseling that he should "be patient" for the warden to respond. The inmate promptly appealed this failure to respond substantively, but never received a response. Eventually, more than 14 months after the inmate had submitted his grievance, the warden finally responded. Apparently concluding that the process had run its course, the inmate accepted the warden's decision and filed suit—and then was found not to have exhausted his administrative remedies, because the court concluded his appeal of the failure to respond to his grievance was not an appeal of the warden's late response. 781 F.3d at 449-51.

These are not outliers. *See, e.g.*, *Pavao v. Sims*, No. 5:13CV233-WS, 2015 WL 1458161 (N.D. Fla. Mar. 30, 2015) (grievances of inmate punched and kicked into unconsciousness by cellmate after guard accused him of being a "child molester" and "F.B.I. confidential source" repeatedly rejected because he wrote on the back of the grievance forms instead of on attachment pages); *Estrada v. White*, No. 2:14-CV-149, 2015 WL 2452388 (S.D. Tex. May 21, 2015) (jail argued prisoner beaten by officer had not engaged in three-step informal resolution, although the jail handbook did not mention it; jail was operating "two grievance procedures with conflicting provisions"); *Johnson v. Patel*, No. CV 14-1598-RGK KK, 2015 WL 3866226 (C.D. Cal. June 18, 2015) (prison argued inmate whose colon was badly damaged during botched operation had failed to exhaust because he submitted with his internal appeal new grievance forms instead of his original forms, even though the original forms had been rejected for including attachment sheets); *Amador v. Andrews*, 655 F.3d 89, 102 (2d Cir. 2011) (female inmate who complained of sexual assault to New York inspector general had failed to exhaust, even though inmates were told to "[w]rite to the Inspector General if you feel more comfortable going directly outside the facility," because her complaint also raised systemic issues subject to the grievance procedure).

However the Court judges the objective reasonableness of the inmates in these particular examples, they show beyond peradventure that inmates with serious complaints can be thwarted by the mechanics of the grievance process, making the prevailing standard for "availability"—a prison administrative remedy is available only if an

objectively reasonable prisoner would know which remedy to use and how to use it (Resp. 12)—an important backstop to ensure that inmates who make reasonable mistakes about these sometimes byzantine, sometimes misapplied procedures do not lose their access to judicial review.

II. An Objectively Reasonable Error Standard Best Promotes the Purpose of the PLRA

The petitioner's proposed rule is also inconsistent with the goals of the PLRA. The purpose of the Act is to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524 (2002), and the exhaustion requirement serves that purpose by "allow[ing] prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court," *Jones v. Bock*, 549 U.S. 199, 204 (2007), which can result in "corrective action taken in response to an inmate's grievance [that] might improve prison administration and satisfy the inmate, thereby obviating the need for litigation," might "filter out some frivolous claims," and facilitates adjudication of those cases which are brought in federal court "by an administrative record that clarifies the contours of the controversy," *Porter v. Nussle*, 534 U.S. 516, 525 (2002) (citations omitted).

The prevailing rule allowing inmates to pursue claims in federal court despite objectively reasonable errors during the grievance process best promotes the purpose of the PLRA in general and the exhaustion requirement in particular for several reasons.

First, it creates incentives to improve grievance systems by placing the risk of confusing procedures on those who are best able to fix them: the institutions that devise those procedures. If inmates who make objectively reasonable errors about grievance rules may still pursue claims in federal court, then senior prison staff and state and local officials stand to benefit from identifying the mistakes prisoners make and improving their explanations of the rules or the operation of the rules themselves. By contrast, if the rule petitioner advances were adopted, anything short of active interference with an inmate's attempt to assert a grievance would be insulated from judicial review, and prison officials would have less reason to make sure the procedures are functional and comprehensible, because the risk of a mistake would be on the prisoner.

There is anecdotal evidence that these incentives work in practice. In *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), an Illinois prisoner filed two grievances complaining of sexual assault and retaliation. The district court found he had failed to exhaust, and the inmate appealed. The Seventh Circuit reversed, rejecting the prison's argument that the inmate had not provided sufficiently complete grievances, because neither state law nor institutional rules prescribed "the contents of a grievance or the necessary degree of factual particularity," and concluding that "[w]hen the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." *Strong*, 297 F.3d at 650. Within six months, the state's department of corrections had proposed amendments to the administrative code to fill this gap. *See* 20 Ill. Admin. Code § 504.810(b) ("The grievance shall contain factual

details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint."); *see generally* Antonieta Pimienta, Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the "Object Intelligibly" Standard, 114 Colum. L. Rev. 1209, 1245 (2014) (recounting this history).

Second, by encouraging prisons to create grievance systems that prisoners can navigate, the prevailing rule decreases the likelihood that a prisoner will resort to federal court litigation. If prisoners understand how to put their complaints before the right person within their institution, there is a greater opportunity for the prison to resolve those individual complaints. Resolving legitimate inmate complaints reduces lawsuits. *See Jones v. Bock*, 549 U.S. 199, 219 (2007) ("We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved "). Additionally, prisoners who perceive that they have been treated fairly—because they understand the grievance process and were able to surmount procedural roadblocks—are less likely to take issue with the outcome, and so less likely to pursue judicial relief. *See* Am. Corr. Ass'n, Riots and Disturbances in Correctional Institutions at 11-12 (1981) ("Prompt and positive handling of inmates' complaints and grievances is essential in maintaining good morale. A firm 'no' answer can be as effective as granting a request in reducing an individual inmate's tensions, particularly if he feels the problem has been given genuine consideration by

appropriate officials and if given a reason for the denial.").

Improvements in grievance systems inspired by these incentives redound to the benefit of the institution as a whole. An effective grievance system "can provide a willing administrator with an invaluable tool for obtaining control over a system, an institution, or a program by making sure he/she has sufficient information to understand and direct it." J. Michael Keating, Prison Grievance Mechanisms Manual, U.S. Dep't of Justice, Law Enforcement Assistance Administration, at 18 (1977). The American Correctional Association has identified an effective grievance system as a key tool to head off prison violence. "A most dangerous situation arises when inmates have grievances they feel can be corrected if only the proper officials are made aware of their problems. Inmates know that disturbances are certain to give their complaints wide publicity when less drastic measures fail." Am. Corr. Ass'n, *supra*, at 11-12. To be effective, however, a system must be "used," be "perceived by inmates and line staff to be fair," and "[a]ctually solve[] problems." Keating, *supra*, at 2. When an inmate does not get his grievance heard because he has made a reasonable mistake about the procedures, the system is not used to any effect, will not be seen as fair, and does not solve problems.

III. Adopting the Petitioner's Proposed Rule Would Prevent the Most Vulnerable Individuals from Pursuing Claims

The Court should also reject the petitioner's proposal to create a new, "no mistake" rule because it would prevent the most vulnerable prisoners—who are also the most likely to make procedural mistakes when asserting grievances—from ever obtaining review of their claims.

People with mental illness are overrepresented in prisons. While an estimated 5 percent of the American population is estimated to have a serious mental illness, studies suggest that between 11 and 19 percent of prisoners do. *See* Seth Jacob Prins & Laura Draper, Improving Outcomes for People with Mental Illnesses under Community Corrections Supervision, Council of State Governments Justice Center, at 11 (2009); U.S. Dep't of Justice, Bureau of Justice Statistics, Mental Health Treatment of Inmates and Probationers, at 2 (1999) ("BJS 1999"). Those with mental illness also spend more time in prison than those without. Studies have found, for example, that in Florida's Orange County Jail, the average stay for all inmates was 26 days; for mentally ill inmates, 51 days. In New York's Rikers Island Jail, the average stay for all inmates was 42 days; for mentally ill inmates, 215 days. Treatment Advocacy Center, The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey, at 14 (April 8, 2014).

Longer prison stays mean more opportunities for legitimate grievances to arise, and the intellectual disorganization that characterizes much mental illness means that these prisoners are more likely to struggle

to follow procedural rules when trying to address those grievances. *Cf.* BJS 1999 at 9 (mentally ill are more likely to be punished for rule violations). The petitioner's suggested standard would show these citizens no mercy, no matter how objectively reasonable their mistake or meritorious their claims.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Fourth Circuit.

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No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

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SHAIDON BLAKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 38 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Fourth Circuit misapply this Court's precedents in holding, in conflict with several other federal courts of appeals, that there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he has satisfied exhaustion by participating in an internal investigation?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici curiae—the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming—submit this brief in support of Petitioner because the Fourth Circuit's exception to the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") will have a significant negative impact on States if adopted by this Court. In the decision below, the Fourth Circuit concluded that the exhaustion requirement is "not absolute." *Blake v. Ross*, 787 F.3d 693, 698 (4th Cir. 2015). And it adopted a judicially created exception for circumstances where a court finds a prison's administrative grievance procedures "ambiguous" and a prisoner reasonably believes he or she has exhausted all administrative remedies. *Id.* at 699.

Petitioner has well explained that the Fourth Circuit's exception contravenes this Court's established precedent regarding the PLRA's exhaustion requirement. Among other arguments, the exception is inconsistent with *Booth v. Churner*, 532 U.S. 731 (2001), in which this Court "stress[ed]"

that it "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6. It runs afoul of *Jones v. Bock*, 549 U.S. 199 (2007), in which this Court cautioned lower courts against "read[ing] in" to the PLRA exceptions "by way of creation." *Id.* at 216. It conflicts with *Woodford v. Ngo*, 548 U.S. 81 (2007), which held that substantial compliance with prison regulations cannot suffice. And it cannot be squared with this Court's acknowledgment in *Porter v. Nussle*, 534 U.S. 516 (2002), and other cases that the federal courts no longer have discretion to dispense with exhaustion in the "interests of justice" to determine whether administrative remedies are sufficiently "plain, speedy, and effective." *Id.* at 524.

The *amici* States will not repeat those arguments, but submit this brief instead to highlight the benefits of the PLRA's exhaustion requirement, and to explain how the Fourth Circuit's judicially created exception to that requirement will undermine those benefits.

SUMMARY OF ARGUMENT

As this Court has recognized, one of the primary purposes of the PLRA was to promote efficiency by "reduc[ing] the quantity and improve[ing] the quality of prisoner suits." *Nussle*, 534 U.S. at 524. The PLRA's exhaustion requirement achieves these ends by "filter[ing] out the bad claims and facilitat[ing] consideration of the good." *Jones*, 549 U.S. at 204.

Administrative grievance proceedings can provide quick relief to prisoners with meritorious claims; the "informality and relative simplicity of prison grievance systems" are comparatively easier to navigate than the "numerous unforgiving deadlines and other procedural requirements" that confront *pro se* prisoners in federal court. *Woodford v. Ngo*, 548 U.S. 81, 103 (2006). Such proceedings also efficiently weed out frivolous claims, and ensure the creation of an administrative record for those matters that do end up in court.

These features of administrative exhaustion—ease of accessibility for prisoners, speed, thorough and timely investigation, and the efficient filtering of claims—are reflected in the administrative grievance procedures being used by States today. As shown below in a review of the procedures being used in five States, existing prison grievance procedures are designed to be simple and accessible for inmates. They also universally require review on a relatively speedy schedule, mandate investigation and a written response, and are successful in reducing the number of claims that go to court.

The Fourth Circuit's exception to the PLRA's exhaustion requirement will undermine these real-world benefits. If this Court adopts the Fourth Circuit's exception, every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, will have an incentive to file in court and take a chance on arguing that he or she found the

State's administrative grievance procedures to be confusing. There will be many more petitions, and they will lack the benefit of having had a record developed through an administrative process. Moreover, a greater number of prisoner petitions will survive dismissal for failure to exhaust and will proceed to summary judgment or trial. Finally, under the Fourth Circuit's approach, there are likely to be less—not more—accessible procedures for inmate grievances. State departments of corrections may be forced to add unnecessary and complicating detail to currently straightforward inmate grievance procedures in an effort to "anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Blake*, 787 F.3d at 705 (Agee, J., dissenting).

ARGUMENT

I. State Administrative Grievance Procedures Reflect The Benefits Attributed By This Court To The PLRA's Exhaustion Requirement.

A. Any requirement of exhaustion of administrative remedies serves "two main purposes." *Woodford*, 548 U.S. at 89 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). *First*, it "protects administrative agency authority" by giving an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Woodford*, 548 U.S. at 89 (internal quotations omitted). *Second*,

"exhaustion promotes efficiency." *Ibid.*

In the context of the PLRA, this Court has stressed the importance of the second main purpose of promoting efficiency. It is "[b]eyond doubt" that Congress enacted the PLRA's exhaustion requirement to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Indeed, the PLRA's "invigorated" exhaustion requirement was a "centerpiece" of Congress's effort to bring "a sharp rise in prisoner litigation" "under control." *Woodford*, 548 U.S. at 84 (internal quotations omitted); see also *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 676 (4th Cir. 2005) (noting that at the time of the PLRA's enactment, "an ever-growing number of prison-condition lawsuits were threatening to overwhelm the capacity of the federal judiciary").

As this Court has explained, the PLRA's exhaustion requirement achieves greater efficiency in part by reducing the number of prisoner lawsuits. "Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Woodford*, 548 U.S. at 89. This "reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court." *Id.* at 94; see also *id.* at 89; *Nussle*, 534 U.S. at 525; *McCarthy*, 503 U.S. at 145. In other words, the exhaustion requirement will "filter out the bad claims and facilitate consideration of the good,"

Jones, 549 U.S. at 204, thus helping to address "the challenge [of] ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit," *id.* at 203.

Greater efficiency is also achieved in those prisoner lawsuits that do go to court. "[F]or cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Nussle*, 534 U.S. at 525. "[P]roper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court." *Woodford*, 548 U.S. at 95; see also *McCarthy*, 503 U.S. at 145. The speed of administrative proceedings is particularly critical to prisoners' ability to produce useful records. "When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Woodford*, 548 U.S. at 95.

While some have suggested that the PLRA's exhaustion requirement "will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners [in order to] defeat their claims," this Court has rightly refused to entertain such "speculati[on]." *Id.* at 102. To the contrary, this Court has observed that "[c]orrections officials concerned about maintaining order in their institutions have a reason for creating

and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances." *Ibid.* Moreover, the "informality and relative simplicity of prison grievance systems" are comparatively easier to navigate the "numerous unforgiving deadlines and other procedural requirements" that confront *pro se* prisoners in federal court. *Id.* at 103.

B. These features of administrative exhaustion—ease of accessibility for prisoners, speed, thorough and timely investigation, and the efficient filtering of claims—are reflected in the administrative grievance procedures being used by States today. By way of illustration, *amici* review below the procedures from five States: West Virginia, Colorado, Michigan, Florida, and Texas.

1. In West Virginia, inmate grievance procedures are set forth in an eleven-page policy directive of the Division of Corrections ("WV DOC") that provides a streamlined and accessible process to all inmates. Filing a grievance requires only the submission of a standard one-page "grievance form," copies of which "shall be made available to members of the inmate population at all institutions/facilities/centers." See Inmate Grievance Procedures, Policy Directive No. 335.00 at 5-6 (W.V. Div. of Corr. August 1, 2013). "At a minimum, grievance forms shall be available in all inmate housing units and the law libraries." *Ibid.* As a general rule, the policy directive instructs that inmates are "not to be told that an issue is not

'grievable.'" *Id.* at 5. And inmates are usually given an opportunity to correct procedurally defective grievance forms. "Except for grievances rejected due to having been previously addressed in a grievance or those filed beyond the time limits to file a grievance, inmate[s] shall have five (5) days to correct [a] defect and re-file a new grievance." *Id.* at 6.

The WV DOC's procedures are specifically designed to resolve grievances quickly. An inmate has 15 days from the date of the aggrieved conduct to file a formal grievance with his or her Unit Manager. *Id.* at 5-6. The Unit Manager has 5 days to investigate and answer those grievances properly filed, and an inmate then has 5 days to appeal to the Warden. *Id.* at 7. The Warden has 5 days to resolve the appeal, and if the inmate remains unsatisfied, the inmate has 5 days to appeal to the Commissioner. *Id.* at 7-8. The Commissioner will review the grievance for grounds for rejection, and provide a written answer within 10 days. *Id.* at 8-9. In total, grievances are to be resolved within 45 days.

There are also built-in contingencies to ensure timely review in unusual circumstances. If relevant prison officials miss their deadlines for responding to the grievance or an appeal, an inmate is permitted to "treat the non-response as a denial of his/her grievance." *Id.* at 7; see also *id.* at 8. And in cases where an inmate is alleging that he or she is subject to "a substantial risk of imminent sexual abuse," the inmate is permitted to file a grievance directly with

the Warden, who must make an initial response within 48 hours and issue a final written response within 5 calendar days. *Id.* at 10.

In addition, the procedures ensure a timely investigation by prison officials. After a grievance is initially filed, the Unit Manager is responsible for logging and tracking the grievance, investigating the allegations, and providing an answer within 5 days. *Id.* at 6. The policy directive requires that the answer be "clear, concise, complete, and professional." *Ibid.* As this Court has noted, such a timeframe ensures that "witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Woodford*, 548 U.S. at 95.

Finally, records show that the WV DOC's procedures are successful in efficiently winnowing claims, presumably because inmates are satisfied with the result or decide it is not worth pursuing their complaints. According to the WV DOC, on December 31, 2014 it housed approximately 5,867 inmates. It further reports that in 2014, there were a total of 10,244 grievances filed at the Unit Manager level, and of these grievances, only 4,070 were appealed to the Warden.

2. States with much larger prison populations than West Virginia—such as Colorado (17,954 inmates), Michigan (roughly 43,000 inmates), Florida (99,373 inmates), and Texas (146,984 inmates)—have grievance procedures that similarly

reflect the benefits of administrative exhaustion. [1]

a. In Colorado, inmate grievance procedures are set out in an eleven-page regulation of the Colorado Department of Corrections ("CO DOC"). It is the express policy of the CO DOC "to maintain a written grievance procedure that is made available to all offenders and that includes three levels of appeal." See Grievance Procedures, Regulation No. 850-04 at 1 (CO Dep't of Corr. March 15, 2015). The regulation requires that "[a]ll offenders [be] informed about how to access the grievance system," both "orally and in writing in a language that is easily understood by each offender." *Id.* at 2. To that end, "[a]ll offenders receive orientation to the grievance procedure, in an understandable and accessible format (i.e. language translation, sign language interpretation, audio/visual) within 30 calendar days of admission to DOC and subsequently during their facility specific orientation." *Ibid.* The grievance form is only one page long and simple in format. See DC Form 85004B (CO Dep't of Corr., March 15, 2015).

Like in West Virginia, there are procedural protections in place for the inmates. Offenders are generally given an opportunity to "cure" a

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[1] See CO. Dep't of Corr., Monthly Population and Capacity Report, (April 30, 2015); MI Dep't of Corr., Prison Population Projection Report (Feb. 2015); 42-43, http://www.dc.state.fl.us/pub/pop/monthly/#pop (last visited Jan. 14, 2016); TX Dep't of Corr. of Crim. Justice, Statistical Report FY 2014.

"procedurally deficient" grievance, *id.* at 3, and "[o]ffenders who require an accommodation to file a grievance, or who are otherwise unable to complete the grievance form are authorized to obtain assistance from other offenders, if the assistance requested does not interfere with the security of the facility," *ibid.* Although certain issues are considered non-grievable, even grievances that raise such issues are not simply dismissed outright. "Grievances filed requesting review of non-grievable issues listed above shall be informally discussed with the offender by staff and documented appropriately in the offender chronological record." *Id.* at 5. Finally, though inmates may face restrictions if they file "multiple, frivolous grievances in a short period of time," *id.* at 9, the regulation specifically provides that "[r]eprisals for the good faith use of or participation in the grievance procedure are prohibited," *id.* at 2.

The CO DOC's administrative grievance procedures also provide for relatively speedy review. Inmates must attempt an informal resolution of a grievance prior to seeking formal administrative review, *id.* at 2, but in any event, any formal grievance must be filed within 30 calendar days of the aggrieved incident, *id.* at 8. The case manager has 25 days to respond, after which an inmate has 5 days to appeal to the "administrative head or designee," who then has 25 days to review and answer. *Id.* at 7-8. If the inmate remains unsatisfied, he or she has 5 days to appeal to the grievance officer, who has 45 days to review. *Ibid.*

In total, grievances are generally to be resolved within 135 days. "In the event the time limit concerning any step of the process expires without a response, the offender may proceed to the next step within five calendar days of the date the response was due." *Id.* at 8. And where "there are indications of potential and substantial risk to the life or safety of the offender, or when irreparable harm to the offender's health is imminent," a written response documenting a remedy "must be rendered within three business days." *Id.* at 9.

Finally, the procedures specifically require detailed tracking of any grievance, as well as thorough investigation. "Grievance coordinators shall log and scan each grievance received into the electronic grievance database, route, and track each grievance filed with their facility." *Id.* at 4. And "DOC employees, contract workers, volunteers, or the grievance officer" are expressly instructed to "sufficiently investigate the circumstances surrounding the problem or complaint and the meaningful remedy requested to formulate a meaningful response." *Id.* at 6. To ensure a complete investigation, the procedures contemplate that "[w]hen a good faith investigation into the issue alleged in the grievance will proceed past the time limitation," corrections officials will timely notify the inmate in writing. *Id.* at 8.

b. The Michigan Department of Corrections ("MDOC") sets forth its administrative remedy procedures in a seven-page policy directive that

likewise includes measures to make the process accessible to inmates. Prison officials are instructed to "ensure prisoners and parolees are provided assistance in completing a grievance form, if needed." See Prisoner/Parolee Grievances, Policy Directive No. 03.02.130 at 3 (MI Dep't of Corr. July 9, 2007). Moreover, for certain facilities, "grievances shall not be rejected or denied solely because the prisoner has not included with his/her grievance exhibits or other documents related to the grievance." *Id.* at 2. Instead, "[i]f the grievance references documents and those documents are not in the prisoner's files or otherwise available to the grievance coordinator or respondent except through the prisoner, the documents shall be reviewed with the prisoner as part of the grievance investigation process." *Ibid.* And if a copy of a document is needed for the grievance investigation, "the copy shall be made at Department expense." *Ibid.* Further, it is specified that "[a] grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process," and corrections staff are expressly required to "avoid any action that gives the appearance of reprisal for using the grievance process." *Id.* at 2-3.

The MDOC's three levels of review "shall generally be completed within 120 calendar days." *Id.* at 4. An inmate must first "attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue," *id.* at 3, and then has 5 days thereafter to file a formal grievance with a Step I grievance

coordinator, *id.* at 4. If the grievance is accepted, a response must be given within 15 days after receipt of the grievance. *Id.* at 4-5. The inmate may appeal the response to a Step II grievance coordinator within 10 days of receiving the response, and an answer to that appeal is due within 15 days. *Ibid.* The inmate then has 10 business days to further appeal. *Ibid.*

As in other States, built-in contingencies ensure timely review. Although extensions may be granted for DOC officials to respond, those extensions are limited in almost all circumstances to 15 business days. *Id.* at 4. Moreover, if a grievant does not receive a response "within required time frames, including any extensions granted, the grievant may forward the grievance to the next step of the grievance process within ten business days after the response deadline expired, including any extensions which have been granted." *Ibid.* And issues "of an emergent nature" may be handled on an expedited basis. *Id.* at 5.

There are also express requirements for tracking grievances and ensuring a thorough investigation. "The Grievance Coordinator shall log and assign a unique identifying number to each Step I grievance received, including those which may be rejected." *Id.* at 4. The Grievance Coordinator is also responsible for ensuring "a thorough investigation was completed for each Step I grievance accepted," which includes permitting an interview of the grievant to allow the grievant to "explain the grievance more completely"

and "to identify and gather any additional information needed to respond to the grievance." *Id.* at 5. The procedures also mandate that at Step II, "[t]he Grievance Coordinator shall ensure that any additional investigation was completed as necessary." *Id.* at 6.

c. The grievance procedures of the Florida Department of Corrections ("FL DOC") are similar to the others. A copy of the rules is made available "for access by inmates at a minimum in the inmate library and from the housing officer of any confinement unit." Fla. Admin. Code Ann. r. 33-103.015(10). The rules specifically allow inmates "to seek assistance from other inmates or staff members in completing the grievance forms as long as the assistance requested does not interfere with the security and order of the institution." Fla. Admin. Code Ann. r. 33-103.015. And "[w]riting paper and writing utensils shall be provided to those inmates who have insufficient funds in their accounts at the time the materials are requested if such are needed to prepare the grievance or grievance appeal." *Ibid.* Submission of grievances is made easy as well. Grievances (and any appeals) are to be placed in locked grievance boxes, which "shall be available to inmates in open population and special housing units." Fla. Admin. Code Ann. r. 33-103.006.

Various other measures further ensure that inmates have access to the grievance process. Subject to certain exceptions, an inmate who has a grievance returned to him or her "may refile utilizing

the proper procedure or correct the stated deficiency and refile if upon receipt of this notification the filing is within time frames allowable." Fla. Admin. Code Ann. r. 33-103.014. The procedures also expressly state that "[i]nmates shall be allowed access to the grievance process without hindrance," and that "[s]taff found to be obstructing an inmate's access to the grievance process shall be subject to disciplinary action ranging from oral reprimand up to dismissal." Fla. Admin. Code Ann. r. 33-103.017. And finally, the grievance procedures are subject to periodic operational reviews that involve a "survey of staff and inmates, review of employees' and inmates' comments on the effectiveness and credibility of the procedure, on-site visits to institutions and facilities." Fla. Admin. Code r. 33-103.018.

The procedures are designed to resolve inmate grievances within 110 days. Most inmates must first seek informal review of their grievance within 20 days of the occurrence, Fla. Admin. Code Ann. r. 33-103.011(1)(a), 33-103.005, to which a written response is due within 10 days, Fla. Admin. Code Ann. r. 33-103.005(4), 33-103.011(3)(a); see Fla. Admin. Code Ann. r. 33-103.002(15)(a). If the inmate is not satisfied after the informal review, he or she has 15 days from the date of the informal disposition to submit a formal grievance. Fla. Admin. Code Ann. r. 33-103.011(b)(1).[2] A response to any formal

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[2] Those inmates whose grievances fall under the limited exceptions to the informal review requirement must seek a formal review within 15 days of the aggrieved incident. Fla.

grievance is due within 20 days, Fla. Admin. Code Ann. r. 33-103.006(6). Fla. Admin. Code Ann. r. 33-103.011(3)(b); see Fla. Admin. Code Ann. r. 33-103.002(15)(b). Any appeal must be submitted to the FL DOC's Office of the Secretary within 15 days from receipt of the response. Fla. Admin. Code r. 33-103.007, 33-103.011(1)(c). The Bureau of Policy Management and Inmate Appeals must then conduct an "appropriate investigation and evaluation" and submit a response to the inmate within 30 days. Fla. Admin. Code r. 33-103.007(4)(e) & (f), 33-103.011(3)(c).

All grievances must be tracked and fully investigated, including in some cases through the solicitation of comments from other inmates. "The institutional grievance coordinator shall log all formal grievances and provide the inmates with receipts." Fla. Admin. Code Ann. r. 33-103.006. The procedures explicitly state that Responses to grievances are to be provided "[f]ollowing investigation and evaluation," and "[t]he degree of investigation is determined by the complexity of the issue and the content of the grievance." Fla. Admin. Code Ann. r. 33-103.006. FL DOC also has a process for "solicitation of written comments by inmates and employees on selected formal inmate grievances that staff determine will significantly impact the inmate population and which challenge general procedures and practices prior to the initial adjudication of the

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Admin. Code Ann. r. 33-103.011(b)(2), 33-103.006.

grievance." Fla. Admin. Code Ann. r. 33-103.004. In those circumstances, "[e]ach institution shall within 5 calendar days of receipt, post copies of this type of formal grievance on inmate and employee bulletin boards, circulate among all inmates in all disciplinary, administrative, and close management areas, including all inmates under sentence of death." *Ibid.*

d. Lastly, the administrative grievance procedures in Texas are set forth in several very succinct one- to two-page formats that are made widely available to inmates. As explained by the Texas Department of Criminal Justice, Administrative Review and Risk Management Division ("TDCJ"), the Offender Grievance Program is designed "[t]o promote awareness and positive intervention between staff and offenders, to identify and resolve issues at the lowest possible level, and to facilitate the flow of information between the units and agency leaders." Tex. Dep't of Criminal Justice, *Offender Grievance Program*, http://www.tdcj.state.tx.us/divisions/arrm/arrm_res_grievance.html (last visited Jan. 14, 2016). The program "offers the offender a less formal alternative to litigation, thus saving taxpayers the cost of defending the agency in court." See Offender Grievance Program pamphlet, (TX Dep't of Criminal Justice, Offender Grievance Program, Jan. 1, 2015). Grievance forms "are available from the law library, housing area, shift supervisors, or by contacting the unit grievance office," and they may either be placed in a "grievance box" or "hand[ed] directly to the grievance

investigator on [the inmate's] unit." See Offender Grievance Manual, App. B (TX Dep't of Criminal Justice, June 2015). Moreover, "instructions on how to write and submit grievance[s] are posted in house areas, law libraries, and high traffic areas of the unit, such as hallways, and dining halls." See Offender Grievance Program pamphlet. And in most cases, if a grievance is returned as defective, it "may be corrected and resubmitted within 15 days from the signature date on the returned grievance." Offender Grievance Manual.

The two-step process generally takes no more than 100 days for non-medical grievances and 105 days for medical grievances. Inmates are required first to attempt to resolve their grievances informally, and then have 15 days from the date of the aggrieved incident to file a Step 1 grievance with a unit grievance coordinator. *Ibid.* The unit grievance coordinator has 40 days to investigate and respond. *Ibid.* If the inmate is not satisfied, he or she has 15 days from "the Step 1 signature" to appeal to Step 2. *Ibid.* The Central Grievance Office then has 40 days to investigate and respond to a non-medical grievance, and 45 days for medical grievances. See Offender Grievance Manual, Offender Grievance Program pamphlet. To ensure a thorough investigation, the procedures reserve the possibility of an extension of the deadlines. See Offender Grievance Manual.

Statistics show that the TDCJ Offender Grievance Progam has been effective at reducing

claims before they reach federal court. In FY 2014, there were a "combined 249,686 Step 1 and Step 2 grievances" filed by inmates in its units, and only about 26% of all Step 1 grievances were appealed to the second step." See Offender Grievance Program pamphlet.

II. The Fourth Circuit's Decision Will Burden States And Federal District Courts With Increased And Lower Quality Prisoner Litigation.

A. The benefits of the PLRA's exhaustion requirement would be quickly eroded under the Fourth Circuit's exception. Like the exception this Court rejected in *Woodford*, the Fourth Circuit's exception here "would make the PLRA exhaustion scheme wholly ineffective." 548 U.S. at 95. As this Court observed in *Woodford*, "[a] prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction, and under [the Fourth Circuit's] interpretation of the PLRA noncompliance carries no significant sanction." *Ibid.*

In the case below, the Fourth Circuit turned the exhaustion requirement into "a largely useless appendage." *Id.* at 93. The court excused Blake's failure to exhaust the prison's administrative process, even though Blake admitted that he had not read all of the prison's materials relating to the administrative process. The court found that the

prison's materials were confusing simply because they did not *specifically* contradict Blake's particular, alleged misunderstanding.[3] And the court determined that the prison administrators had sufficient opportunity to develop an administrative record, even though Blake did not initiate any procedures with the prison, requested at one point that the investigation be closed, and expressly disavowed any intent to sue anyone. 787 F.3d at 704-05. (Agee, J., dissenting).

B. 1. There can be no doubt that prisoners throughout the country will see a court's adoption of the Fourth Circuit's approach as an invitation to file suit even where they have clearly failed—or, as in this case, never attempted—to follow their prisons' administrative procedures. As this Court has said, "exhaustion requirements are designed to deal with parties who do not want to exhaust," which tends to be the case with prisoners. *Woodford*, 548 U.S. at 90; see also *id.* at 89 ("Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not

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[3] Contrary to the majority's conclusion, like the procedures outlined above, Maryland's grievance procedures were not ambiguous or otherwise confusing. *Blake*, 787 F.3d at 702 (Agee, J., dissenting). As Judge Agee explained in his dissent, "[o]ne can hardly imagine a plainer provision that more directly applies to Blake's present claim," as Maryland's procedures "specifically instruct[] prisoners to use the [administrative remedy procedure] to 'seek relief ... for issues that include ... [u]se of force.'" *Id.* at 702.

voluntarily exhaust."); *Doe v. Washington Cnty.*, 150 F.3d 920, 924 (8th Cir. 1998) ("The PLRA was designed to discourage the initiation of litigation by a certain class of individuals—prisoners—that is otherwise motivated to bring frivolous complaints as a means of gaining a short sabbatical in the nearest Federal courthouse." (internal quotation marks omitted)). The inevitable result of the Fourth Circuit's broad exception will be the very scenario the PLRA was meant to prevent—the inundation of federal district courts with undeveloped and potentially nonmeritorious prisoner complaints. Every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, would have an incentive to file in court and take a chance on arguing that his or her State's administrative grievance procedures are confusing.

Given the success of the PLRA in reducing claims that go to court, it is not difficult to imagine the potential increased burden on federal district courts and the States that face such lawsuits. As the statistics from just three States show, the PLRA's exhaustion requirement has been effective in limiting the number of suits filed by prisoners in federal court. The number of suits filed in federal court has been small compared to the number of administrative grievances, which in turn has been small compared to the total number of state prisoners. The flip side of this effectiveness, however, is the potential for a significantly greater number of filings in court if this Court adopts the Fourth Circuit's rule.

In West Virginia, for example, there were approximately 6,973 inmates housed in its facilities on December 31, 2013. That same year, there were approximately 1,505 prisoner grievances and disciplinary actions appealed to the Commissioner in accordance with the WV DOC administrative review procedures, and only 164 prisoner petitions alleging civil rights or prison condition issues filed in the Northern and Southern Districts of West Virginia by WV DOC inmates. See U.S. District Courts-Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending Sept. 30, 2014, Table C-3, http://www.uscourts.gov/statistics/table/c-3/judicial-business/2014/09/30 (last visited Feb. 2, 2016).

Similarly, Maryland's Division of Corrections ("MD DOC") housed approximately 21,500 inmates in its correctional facilities. In calendar year 2013, the MD DOC received approximately 20,193 formal prisoner complaints through its Administrative Remedy Procedure, which are reviewed and resolved by the warden. See also Pet. App. at 77-81. Of these formal complaints, approximately 2,452 were appealed to the Commissioner, and then approximately 2,321 were appealed to the Inmate Grievance Office, which is the final step in the administrative review process. The Administrative Office of the U.S. Courts reports that in fiscal year 2013-2014, MD DOC inmates ultimately filed 489 prisoner petitions in the District of Maryland alleging civil rights or prison condition issues. *Ibid.*

Finally, over the same time period in North Carolina, according to the North Carolina Department of Public Safety ("NCDPS"), there were approximately 37,319 inmates as of January 1, 2014. That year, the NCDPS Inmate Grievance Resolution Board, which oversees the final step in the State's administrative review procedures, received approximately 14,654 grievances. And ultimately, the federal courts report that there were 697 prisoner petitions from NCDPS inmates pending in the U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina that alleged civil rights or prison condition issues. *Ibid.*

The increased burden on the system will come not only from a greater number of filings in court, but also from a greater number of prisoner petitions that survive dismissal for failure to exhaust and proceed to summary judgment or trial. Consider for example that from January 1, 2014 through September 2015, according to Maryland's internal database, the District of Maryland dismissed in whole or in part for failure to exhaust approximately 53% of the prisoner civil rights suits in which the court addressed the exhaustion defense raised by the Office of the Attorney General of Maryland. Under the Fourth Circuit's new exception, at least some of these petitions would have survived dismissal and proceeded to summary judgment or trial, creating an additional burden on both the District of Maryland and the Maryland Attorney General's Office.

2. The Fourth Circuit's exception is also likely to

result in less—not more—accessible procedures for inmate grievances. Under the Fourth Circuit's approach, the burden is on state corrections agencies to produce materials that affirmatively "contradict [an inmate's] belief that he had exhausted his administrative remedies." *Blake*, 787 F.3d at 700. The foreseeable consequence of this requirement is the convolution of what have until now been straightforward and accessible inmate grievance procedures.

As set forth above, existing prison grievance procedures are currently designed to be simple and accessible for inmates. Grievance forms tend to be a single, uncomplicated form. Assistance is often available. And prisoners who file defective grievances are usually permitted to correct the defects and resubmit the forms.

But as Judge Agee explained in dissent below, "jail officials [now] must anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Id.* at 705 (Agee, J., dissenting). That is "a substantial new burden on state corrections officials," *ibid.*, and may force prisons to adopt convoluted and increasingly voluminous procedural rules, laden with unnecessary detail. The increased complexity may then lead to more inmates who claim confusion, which will in turn require even more detail, creating a vicious cycle that benefits neither prisoners nor prison administrators and undermines the very

purpose of the PLRA.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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